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Alberta Public Utilities Board Decisions
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VOLUME XII *Board*

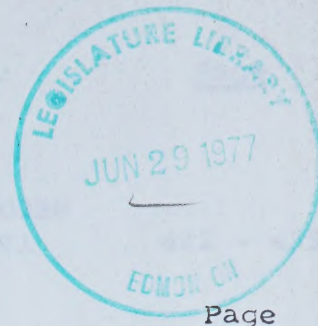
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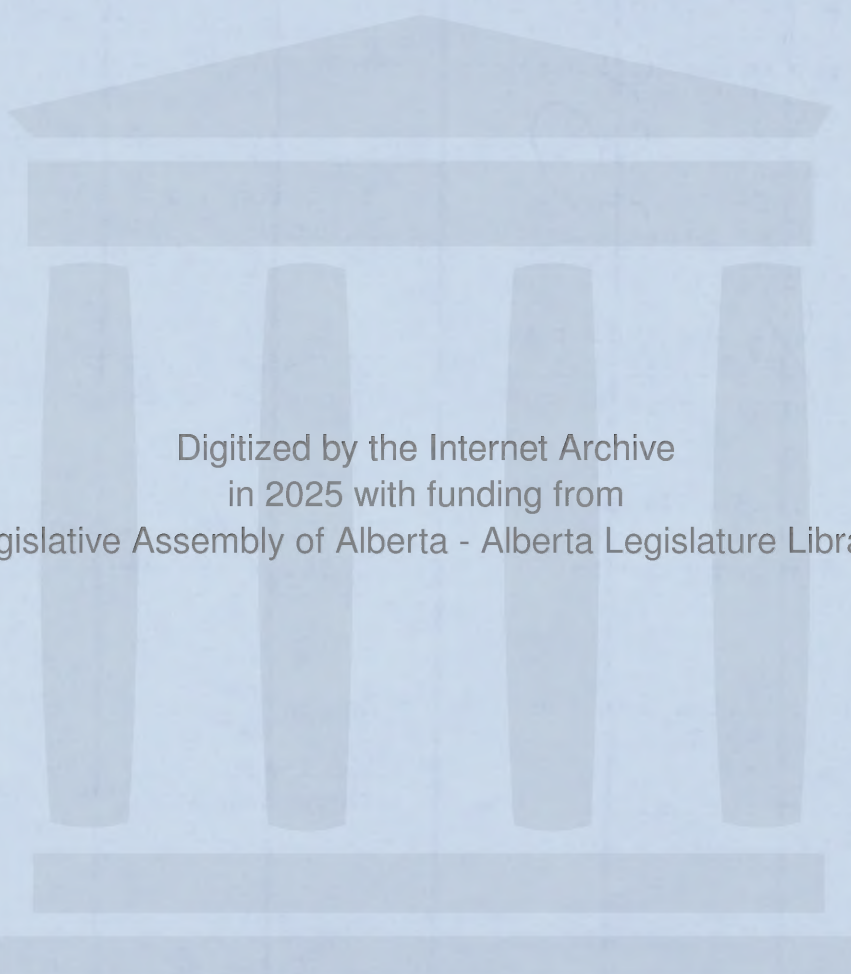
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IN THE MATTER OF "The Gas Utilities Act":

AND IN THE MATTER OF "The Public Utilities Board Act":

AND IN THE MATTER OF an application to the Public Utilities Board by Inter-Provincial Gas Company (1964) Limited for a revision of its rates:

APPEARANCES:

B. V. Massie, Esq., Q.C.	:	For Inter-Provincial Gas
	:	Company (1964) Limited
A. P. Blakey, Esq.	:	For Wainwright Gas Company
	:	Limited and the Town of
	:	Wainwright

D E C I S I O N

This is an application by Inter-Provincial Gas Company (1964) Limited (hereinafter referred to as "Inter-Provincial") for an order fixing the just and reasonable rate or rates to be charged to its customers to whom it supplies gas.

The application made by Inter-Provincial, which was received by the Board on February 24, 1971, requested an order or orders of the Board:

- "1. Fixing and approving just and reasonable increased rates, charges or schedules thereto for gas to be supplied by the Applicant to its consumers.
2. Determining a rate base for the property of the Applicant that is used or required to be used in the Applicant's service to the public and fixing a fair return thereon.
3. Giving effect to such part of any losses incurred by the Applicant as may be due to any undue delay in the hearing and determining of the application.
4. Fixing and approving such interim rates pending the fixing of final rates as the Board may determine and for such further or other orders as the Board may deem meet.

The application was set down for hearing on June 9, 1971, continued on June 10, was adjourned to June 21 and completed on

that day.

The matter of rates charged for gas in the Town of Wainwright (hereinafter referred to as "the Town") has been before the Board on a number of occasions, the latest resulting in Decision No. 16018 in 1954 and Decision No. 27574 in 1966.

The present applicant, Inter-Provincial, is one of a group of three companies which have been incorporated by the Campbell family who own Inter-Provincial. The history of this group extends back to 1925 when the father of the present owners, W. S. Campbell, formed Wainwright Gas Company Limited (hereinafter referred to as "Wainwright") which acquired in that year, from one C. L. DeVall, a ten-year franchise dated July 22, 1925, granted to him by the Town to supply the inhabitants of the Town with natural gas.

At the same time Wainwright also obtained from DeVall an assignment of an agreement between DeVall and Maple Leaf Oil Company which provided for a supply of gas owned by Maple Leaf to meet the needs of the Town.

In decision 16018 the Board referred to the rather unsatisfactory relationship that had prevailed between Wainwright and the Town. This situation apparently had earlier resulted in the Town asking the Board to fix a value of Wainwright's assets with a view to the Town taking over the system. The Board in a decision dated May 17, 1937 established the value at \$56,522 but the purchase by the Town was never concluded.

Wainwright, without the benefit of a franchise which had expired on July 31, 1936, continued to supply the Town with gas into the year 1943. At that time the gas supply from the Maple Leaf wells was nearing exhaustion and a new supply had to be obtained. For this purpose W. S. Campbell caused to be incorporated Inland Gas & Oil Co. Ltd. (hereinafter referred to as "Inland"). This company was ostensibly incorporated for the purpose of acquiring a supply of gas to meet the Town's requirements and to meet the requirements of the Wainwright Military Camp for which a contract had been negotiated by Mr. Campbell. It appears that the contract for the supply of gas to the Military Camp at Wainwright was between the Department of National Defence and Inland. The reason for the incorporation

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of Inland to obtain the gas supply is referred to in decision 16018 wherein the Board said:

"When asked why Wainwright Gas Company did not try to get the contract Mr. Campbell explained that the Company's (Wainwright) supply from the Maple Leaf wells was not adequate; and Mr. Kennedy, a Director of the Company (Wainwright) and large shareholder, did not want it to go into the drilling and gas producing business."

A gas supply was obtained sufficient to supply the Town and the Camp. The Town then renewed the franchise agreement with Wainwright for a fifteen-year period under By-law No. 347, finally passed on December 7, 1943 and approved by the Board by Order No. 9881 dated October 15, 1943, the renewal being from January 1, 1944 to December 31, 1958.

In 1944 Inland and Wainwright entered into an agreement under which Wainwright would transport Inland's gas for the Military Camp through transmission facilities owned by Wainwright at a rate of 4¢ per mcf. In June 1944, to augment the Maple Leaf wells' source, Wainwright entered into an agreement with Inland to obtain additional gas to meet the Town's requirements, the price agreed upon being 6¢ per mcf., which was the same price paid by Wainwright to Maple Leaf.

When the fifteen-year franchise agreement expired at the end of 1958 the Town commenced negotiations with the owners of Wainwright to acquire Wainwright's distribution system and as a result the Campbell family caused to be incorporated Inter-Provincial; transferred the gathering, processing and transmission system owned by Wainwright to Inter-Provincial; and sold the shares of Wainwright to the Town. This sale was made on or about May 15, 1965.

The situation at the conclusion of these arrangements appears to be:

(1) The Campbell family owned the shares of:

- (a) Inland, which owned or had an interest in natural gas reserves; a contract to supply gas to the Wainwright Military Camp; and a contract with Inter-Provincial to transport gas from the source of supply to the Camp.

(b) Inter-Provincial, which owned the gathering, processing and transmission systems; a contract to transport gas to the Military Camp for Inland; and a contract, dated May 14, 1965, to provide Wainwright with a gas supply to meet the requirements of the Town, which agreement expires on May 15, 1985.

(2) The Town owned the shares of:

(a) Wainwright, which owned the distribution system serving customers in the Town and possibly the environs thereof.

Decision 27574, which the Board issued on June 8, 1966, resulted from an application made by Inter-Provincial to the Board for an order fixing the rates which it could charge Wainwright under the gas supply contract which it had with Wainwright and the Town. In that decision the Board fixed the rate at 23¢ per mcf. for gas delivered by Inter-Provincial to the Town gate, representing 13¢ per mcf. for gathering and transporting the gas and 10¢ representing the gas commodity charge.

It is for an increase in this rate and the rate it charges its rural customers that Inter-Provincial is now applying to the Board.

The witnesses who testified at the hearing were as follows:

For Inter-Provincial:

D. H. Ashcroft - a Chartered Accountant employed by Touche, Ross & Co., Chartered Accountants and the auditors of Inter-Provincial.

A. G. Warke - a Professional Engineer employed by Trans-Canada Pipe Lines Limited as Assistant Manager, Gas Supply Operations.

F. A. Campbell - President and General Manager of Inter-Provincial.

For Wainwright and the Town:

R. J. Sanderman - a Chartered Accountant and the holder

of a Master's Degree in Business Administration from the University of California, employed by Price Waterhouse and Co., Chartered Accountants.

At the present time, in addition to transmitting gas to the Military Camp on behalf of Inland, Inter-Provincial sells and delivers gas to Wainwright to serve the customers of that company, and in addition, also sells and delivers gas to twenty-eight customers, generally referred to as rural customers, who are located throughout the area where Inter-Provincial has gas gathering and transmission lines.

The gas delivered to Wainwright and to each of the rural customers is metered and billed for by Inter-Provincial. Inter-Provincial's operations therefore consist of:

- (a) Metering and processing, where required, gas which it purchases from sources owned or controlled by Inland and transmitting such gas to customers which it serves, including Wainwright.
- (b) Transmitting gas owned by Inland to Inland's customer, the Military Camp.
- (c) Operating and maintaining such processing, gathering, transmission, metering and regulator facilities necessary to deliver gas to its customers.

The Board's jurisdiction to fix rates to be charged by a gas utility is derived from The Gas Utilities Act, chapter 158, R.S.A. 1970 (hereinafter referred to as "the Act"). In fixing such rates the Board is required to determine a rate base for the property of the owner of the utility used in his service to the public. The manner of determining the rate base is set out in section 28 of the Act as follows:

" 28. (1) In fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed thereafter by an owner of a gas utility, the Board shall determine a rate base for the property of the owner that is used or required to be used in his service to the public within Alberta and fix a fair return thereon.

(2) In determining a rate base under this section, the Board shall give due consideration

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" (a) to the cost of the property when first devoted to public use, to prudent acquisition cost to the owner, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all such facts as in its opinion are relevant."

The Board in determining a rate base for utility companies operating in this Province has traditionally used what has come to be referred to as a "mid-year rate base". The rate base upon which the rate of return will be applied is the average of the net depreciated rate base at the beginning and end of each year. In decision 16018 the Board, in determining a rate base for Wainwright, said:

" On the basis of the Board's calculations the Rate Base as of December 31, 1954, will be computed on a mid-year basis as follows:"

Here followed details of the rate base computation showing:

Net value of plant December 31, 1953	\$125,125
Net value of plant December 31, 1954	<u>138,275</u>
	263,400
One-half thereof	131,700
Working capital allowance	
1/8 of cash expenses exclusive	
of gas purchases	6,273
Unamortized transitional loss	<u>25,510</u>
Rate Base December 31, 1954	<u>\$163,483</u>

In decision 27574 the Board, among other things, was concerned with determining a rate base for Inter-Provincial at May 15, 1965, the date upon which the plant, property and equipment, other than the distribution system, was acquired by Inter-Provincial from Wainwright, the shares of Wainwright having been acquired by the Town on that date. While the Board in decision 27574 did not specifically direct that Inter-Provincial's rate base would in future years be determined on a mid-year basis,

the Board nevertheless in decision 27574 referred to the mid-year rate base applicable to Wainwright as determined in decision 26018.

The Board considers that the most appropriate method of determining a rate base for a utility company is on a mid-year basis both from the point of view of the utility and the consumers which it serves and, therefore, in this application, in examining the results of Inter-Provincial's operations from 1965 to 1970, the Board will utilize a rate base calculated on a mid-year basis.

At the 1966 hearing Inter-Provincial suggested an amortization rate of 5% to be applied to its plant, rates of 30% on automotive equipment and tools, and 10% on its field office. The Board, in decision 27574, allowed the rates proposed by Inter-Provincial with respect to automotive equipment and tools and its field office but rejected the 5% rate advocated by Inter-Provincial for its plant. The method which the Board directed Inter-Provincial to use is described in decision 27574 in these words:

" The matter of amortizing the cost of the gathering, processing and transmission system is largely a question of determining the probable length of time that they will remain used and useful. This period is largely dependent upon the continuation of a supply of gas being available to meet the needs of the customers of Wainwright, the customers of Inter-Provincial and the customers of Inland. Inter-Provincial suggests an amortization rate of 5%. The Town advocates a continuation of the 3½% rate.

The uncertainty of the continuing of the supply to the military camp and also the possibility of the development of other gas reserves all have a bearing on what should be a proper rate to apply. In similar cases with which the Board has dealt it has been considered that the most logical method to employ is one which has as its base the estimated recoverable gas reserves from year to year as certified by a professional reservoir engineer. This method appears to the Board to be applicable to the situation in this case. Accordingly, therefore, the following formula shall be employed by Inter-Provincial in determining the amount of amortization to be applied to the unamortized balance of those assets in the rate base consisting of its gathering, processing and transmission system:

Formula

$$\frac{g \ w}{r} \text{ (D.C.)}$$

"where:

- D.C. - represents the original cost of the assets used and useful at the cost determined by the Board herein, together with used and useful additions year to year at the cost recorded on the books of Inter-Provincial at the end of the preceding fiscal year, less accumulated amortization as determined by the Board herein plus subsequent years' amounts determined by this formula.
- g w - represents gas withdrawals during the fiscal period from all reservoirs from which Inter-Provincial obtains its gas supply.
- r - represents the gas reservoir balances remaining at the end of each fiscal period with respect to all sources either owned, leased, or under operation arrangements from which Inter-Provincial obtains its gas supply which shall be the estimated balance of gas reserves capable of being produced at that time plus g w.

Such estimate shall be made and certified by a Member of the Association of Professional Engineers of Alberta qualified to estimate the recoverable reserves of natural gas from the reservoirs.

Subject to the above qualification, the estimate of recoverable reserves shall be determined each odd numbered year and the estimate and certificate of the estimate shall be filed with the Board and a copy provided to the Town. Any interested party which disagrees with the estimate may file an estimate with the Board made by an estimator having the qualifications hereinbefore defined and in such case the Board shall determine the estimate to be used."

The financial statements of Inter-Provincial filed with the Board up to and including the fiscal period ended December 31, 1970 consist of the auditors' report to the shareholders, which included a balance sheet, a statement of income, a statement of deficit and a schedule of fixed assets and accumulated depreciation. This latter schedule indicates that amortization (depreciation) of the various assets owned by Inter-Provincial has been accumulated on the basis of rates permitted to be charged for "capital cost allowances" under the provisions of the Income Tax Act rather than on the basis which the Board directed Inter-Provincial to use for regulatory purposes.

The matter of what amounts are claimed for capital cost

in determining its income tax liability, for corporate income tax purposes, is one which must be decided by Inter-Provincial but, as the Board stated in a decision which it issued on May 4, 1956 in Plains-Western Gas & Electric Co. Ltd. and the Town of Athabasca in which this question was discussed: "It will allow the Company to take income tax on the basis of the tax actually paid or payable".

While the manner in which financial statements may be drawn for income tax or corporate purposes rests with Inter-Provincial's management, Inter-Provincial nevertheless is obligated to file with the Board each year supplementary statements prepared in such manner that they reflect the requirements set forth by the Board in its decisions. This Inter-Provincial has failed to do. Henceforth the Board requires that Inter-Provincial, in addition to filing with the Board copies of its auditors' reports to its shareholders, shall also file with the Board such supplementary statements that are required to provide particulars of its operations and return on its rate base as provided for in this decision.

RATE BASE

At the hearing Inter-Provincial filed a submission, Exhibit 2, prepared on a basis which it considered complied with the directions of the Board as contained in decision 27574. This submission has been prepared, however, on the basis of a "beginning of the year" rate base rather than on a mid-year rate base. In the submission the amortization and depreciation of the gathering, processing and transmission system and other assets has been prepared substantially in accordance with the Board's requirements as directed in decision 27574. With respect to the gathering, processing and transmission system Inter-Provincial now proposes that the Board adopt a straight-line method of amortization based on the expiry date of the contract which it has with Wainwright to supply gas to that company, i.e., May 15, 1985.

The Board rejects this proposal. As was pointed out in decision 27574 "the uncertainty of the continuing of the

supply to the military camp and also the possibility of the development of other gas reserves all have a bearing on what should be a proper rate to apply".

In addition, there is no evidence that Wainwright will not renew its agreement with Inter-Provincial, if the latter, on May 15, 1985, is still in a position to provide a supply of gas to meet Wainwright's requirements.

The Board, therefore, has come to the conclusion that the method of amortization which it directed Inter-Provincial to follow in decision 27574 shall be continued to be used by Inter-Provincial with some modification in the requirement that a certificate be obtained from a qualified reservoir engineer as to the recoverable reserves of natural gas from the reservoirs.

In decision 27574 the Board directed the manner and frequency of obtaining such certificates saying:

"Such estimate shall be made and certified by a Member of the Association of Professional Engineers of Alberta qualified to estimate the recoverable reserves of natural gas from the reservoirs. Subject to the above qualification, the estimate of recoverable reserves shall be determined each odd numbered year and the estimate and certificate of the estimate shall be filed with the Board and a copy provided to the Town. Any interested party which disagrees with the estimate may file an estimate with the Board made by an estimator having the qualifications hereinbefore defined and in such case the Board shall determine the estimate to be used."

The Board is now of the view from the evidence adduced that the frequency of obtaining certificates can be reduced and accordingly the direction contained in decision 27574, which is quoted above, will henceforth be varied to read:

"Such estimate shall be made and certified by a Member of the Association of Professional Engineers, Geologists and Geophysicists of Alberta qualified to estimate the recoverable reserves of natural gas from the reservoirs. Subject to the above qualification, the estimate of recoverable reserves shall be determined as of December 31, 1971, December 31, 1975, December 31, 1980 and December 31, 1985, and so on for each five-year period thereafter unless otherwise directed by the Board. The

"estimate and certificate of the estimate shall be filed with the Board and a copy provided to Wainwright and to the Town. If Wainwright or the Town disagree with the estimate they may file with the Board and Inter-Provincial an estimate made by an estimator having the qualifications hereinbefore defined and in such case the Board shall determine the estimate to be used."

With respect to the other assets of Inter-Provincial used and useful in supplying gas to Wainwright and its other customers, depreciation will continue to be allowed on the basis used by Inter-Provincial in its submission, Exhibit 2. These rates, which will be applied on a "diminishing value" basis are as follows:

Automotive equipment and tools	-	30%
Field office	-	10%

The Board accepts the undepreciated value of Inter-Provincial's plant as set out in Exhibit 2, being \$112,571 at December 31, 1970 and estimated at \$107,876 at December 31, 1971. These balances, on a mid-year basis, result in an average of \$110,224. To this amount the Board will continue to allow Inter-Provincial a \$5,000 working capital allowance so that its estimated rate base at December 31, 1971 is fixed at \$115,224. Particulars of the calculation of this amount are shown in Schedule "A" to this decision.

PRICE OF PURCHASED GAS

Inter-Provincial obtains the gas which it transports and sells to Wainwright from Inland, a company whose shareholders are the same as Inter-Provincial's. It is admitted that Inter-Provincial and Inland are not "at arm's length" in their dealings. Prior to 1971 Inland was charging Inter-Provincial 10¢ per mcf. for gas purchased by Inter-Provincial. On December 15, 1970, by a letter signed by F. A. Campbell as President of Inland, Inter-Provincial, of which Company Mr. Campbell is also President, was informed that commencing January 1, 1971 the charge to Inter-Provincial for gas which it purchased from Inland would be increased to 13¢ per mcf. This letter was filed at the hearing as Exhibit 4.

Mr. Warke, who was called as a witness by Inter-Provincial, testified that Trans-Canada Pipe Lines Limited, by whom he is employed, are paying in the range of 14¢ to 15¢ per mcf. for gas which Trans-Canada is currently purchasing. He also expressed the opinion that the gas which is produced to supply Wainwright could, with reasonable economics and the necessary approvals, be diverted to the Alberta Gas Trunk Line system for export out of Alberta.

Part 1 of the Act, dealing with the field price of gas, gives jurisdiction to the Board to fix such prices on the application of any interested party. No application, however, under Part 1 of the Act has been made to the Board by any of the parties who appeared on this application.

Section 6 of the Act, under which such an application may be made, reads:

- " 6. (1) Notwithstanding the terms of any contract, the Board upon the application of an interested party or municipality or upon its own motion may, and upon an order of the Lieutenant Governor in Council shall, with respect to gas to be used, consumed, stored or retained within Alberta, fix and determine any or all of the following:
- (a) The just and reasonable price or prices to be paid for gas
 - (i) in its natural state as and when produced from the earth at the gas exit from the separator, where a separator is employed, and in all other cases as and when produced from the well-head either alone or in association or conjunction with other petroleum products or hydrocarbons;
 - (ii) before it has been delivered into any gas pipe line;
 - (iii) before it has been subjected to treating or processing by absorption or otherwise for the extraction therefrom of natural gasoline or other hydrocarbons;
 - (iv) before it has been purified, scrubbed or otherwise treated for the extraction or removal therefrom of hydrogen sulphide or other deleterious substance;
 - (v) at any point on a gas pipe line;
 - (b)

- " (c)
- (d)
- (e)
- (f)
- (g)
- (h)

(2) Notwithstanding any other provisions of this Act, in fixing and determining the just and reasonable price or prices as provided for in subsection (1) clauses (a), (b), (g) and (h), the Board is not required or compelled to fix or determine the price or prices for, in respect of, or on the basis of, any individual well or wells, or on the value or cost thereof, or the investment therein, or a rate of return thereon, but may instead fix and determine such price or prices as are applicable generally to all wells in a field, or may fix and determine different prices paid for gas produced from any classifications or groups, and in the fixing and determining of such price or prices the Board may adopt any just and reasonable basis or method of arriving at or computing such price or prices that the Board deems to be applicable or proper having regard to all circumstances and factors involved."

Inter-Provincial asks the Board to include in the expenses which it allows the additional cost which results from the increase in the price of the gas which it purchases from Inland. The acceptance of such a proposal will, of course, increase the operating costs of Inter-Provincial which it hopes to recover in the rates to its customers for which it is seeking the Board's approval in this application.

The Board is of the view that if Inland considers it is entitled to an increase in the 10¢ per mcf. rate which it charged Inter-Provincial prior to January 1, 1971 it had the means of making an application to the Board under the provisions of Part 1 of the Act. This, however, it apparently has not chosen to do.

While no application has been made to the Board by Inland in this regard, nevertheless, as has been indicated earlier in this decision, evidence was given by Mr. Warke concerning the prices being paid by Trans-Canada. It is generally recognized among those engaged in the gas utility business that the price of natural gas has been increasing. This is to be expected because of the increase in prices generally.

The Board could take the position that not having made an application, Inland is not entitled to have the price increased. Such action by the Board, however, would in all likelihood only precipitate an application by Inland with the attendant costs connected with an additional hearing. The Board is of the view that because of the increase in costs and prices generally it would be in the interest of all parties and the customers of Inter-Provincial and Wainwright if it made a determination of the price which Inland should charge Inter-Provincial for the gas which it purchases. Mr. Warke has stated that the prices being paid by Trans-Canada are in the range of 14¢ to 15¢ per mcf. but no evidence was adduced as to whether Inland had other markets for its gas if the contract which it has with Wainwright were terminated. The Board is of the view, after considering all the factors in this case and the trend of prices generally, that a price of 12¢ per mcf. is a fair and reasonable price for the gas which Inland is currently selling to Inter-Provincial. The Board, therefore, in determining the amount of purchased gas expense to which Inter-Provincial is entitled will use as a basis a price of 12¢ per mcf.

GAS RESERVES

The marketable reserves of gas at January 1, 1964 from which Inland obtains its supply was estimated at 12,700 mmcf. This amount, which is referred to in decision 27574, was based on a report prepared by Mitchell & Associates Ltd., Consulting Engineers. A letter, dated April 27, 1965, addressed by Mitchell & Associates Ltd. to Inland, which refers to the report on gas reserves, was filed at the hearing as Exhibit 6.

It is on this amount that Inter-Provincial has calculated amortization on its gathering, processing and transmission systems in the submission which it tendered at the hearing and which was entered as Exhibit 2. The Board has previously pointed out that Inter-Provincial was directed by the Board to file periodically Reservoir Engineer's Certificates as to the estimated recoverable reserves of gas. Inter-Provincial was

also directed to file a copy of the Certificate with the Town. Inter-Provincial failed to comply with this direction of the Board.

At the hearing Mr. Campbell, referring to Exhibit 6, pointed out that at the time the letter was written, Inland had drilled wells on lands which were estimated to have proven reserves of 11,200 mmcf. of gas and had probable additional reserves of 1,200 mmcf. on undrilled acreage. He said Inland dropped its lease on Section 33, which section contained probable reserves of 1,000 mmcf. The reasons which he gives for dropping the lease are:

- (a) There was a drilling commitment involved.
- (b) It was not a Crown section and the annual rentals were double the charge made by the Crown.
- (c) Producing company's gas sales (apparently referring to Inland) were not considered sufficient to support the drilling of an additional well or the payment of rentals and miscellaneous mineral taxes that go with it.

The letter of April 27, 1965, Exhibit 6, has reference to the estimate of the probable additional marketable gas reserves in the Viking Sandstone underlying:

- (a) Section 34, Township 45, Range 8, West of the 4th Meridian on which Inland hold a lease, and
- (b) Section 33, Township 45, Range 8, West of the 4th Meridian, which is a C.P.R. lease covered by an Imperial Oil farmout to Inland.

It is this latter lease which Mr. Campbell testified had been relinquished.

Attached to Exhibit 6 are the conclusions reached by Mitchell and Associates which are as follows:

CONCLUSIONS

(Revised from original report to include undrilled Sections 33 and 34, Township 45, Range 8, West of the 4th Meridian).

1. The ultimate marketable reserves are 21.4 billion cubic feet proven and 1.5 billion cubic feet probable additional, (allowing for 5% surface loss).
2. The remaining marketable reserves at January 1st, 1964, were 11.2 billion cubic feet proven and 1.5 billion cubic feet probable additional.
3. Assuming a constant annual production of 500 million cubic feet of gas sales, the remaining proven and probable additional reserves will last until 1989. "

The probable additional marketable gas reserves underlying these two quarter sections was estimated to be 1,500 mmcf.

It appears from the evidence that the reserves which Inland now has an interest in consist of:

- (a) The remaining reserves which it has underlying the lands on which wells have been drilled;
- (b) The reserves underlying Section 34, Township 45, Range 8, West of the 4th Meridian.

At the hearing Inter-Provincial was directed by the Board to file:

"An estimate of the gas reservoir balances at December 31, 1970 with respect to all sources either owned, leased or under operation arrangements from which the Applicant obtains its gas supply and which are capable of being produced. Such estimate shall be made and certified by a member of the Association of Professional Engineers, Geologists and Geophysicists of Alberta qualified to estimate the recoverable sources of natural gas from the reservoir."

In response to this direction Inter-Provincial tendered a letter from Coulson, Murray, Grumbly & Associates Ltd. which was entered as Exhibit 13. This letter is addressed to Inter-Provincial and is dated June 15, 1971. The subject matter of the letter is said to have reference to "Re: Remaining

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Recoverable Reserves, December 31, 1970 Viking Sandstone in the Viking Kinsella Gas Field".

The letter contains the expression of opinion that the remaining marketable reserves at December 31, 1970 underlying eleven drilled wells amount to 7,500 mmcf. These wells are located on ten sections of land according to the letter, such lands being:

Sections 13, 20, 21, 22, 23, 24, 27, 28,
29 and 32, all in Township 45, Range 8,
West of the 4th Meridian.

No opinion is expressed in the letter as to the probable reserves which may be recovered from Section 34 in which, from the evidence, Inland still appears to have an interest. The Board can only conclude from this that the opinion expressed by Coulson, Murray, Grumbly & Associates Ltd. must be considered as representing a conservative estimate of reserves which Inland has available to it.

The Board in this decision has directed Inter-Provincial to obtain the certificate of a Reservoir Engineer as to the estimated reserves available as at December 31, 1971, which would include all lands in which Inland has an interest in the gas reserves which underlie them. Such information is required, among other things, for the purpose of determining the base to be used in calculating the amount of amortization to which Inter-Provincial is entitled to claim with respect to its gathering, processing and transmission systems.

EXPENSES

In its submission, Exhibit 2, Inter-Provincial estimates its operating expenses, other than the cost of purchased gas, amortization and depreciation to be \$47,900 for the year 1971. The Board dealt at length with the question of a reasonable level of expenses in decision 27574 and came to the conclusion that in 1966 such expenses should be allowed in the amount of \$35,200. The estimate now proposed by Inter-Provincial for the year 1971 represents an increase in the order of 36% over the 5-year period. Expressed another way, the increase represents a compound growth

rate in the level of expenses in the order of 6% per year.

Mr. Sanderman, who was called by Wainwright, recommended that an annual increase of 5% be used. On this basis he submitted a schedule, Exhibit 17, which shows that on a compound growth rate of 5% per annum the increased expenses at the end of a 5-year period would be \$44,924. This is \$2,976 less than Inter-Provincial's estimate of \$47,900.

The most difficult item of expense to resolve is that of salaries paid to F. A. Campbell and his brother George W. Campbell. The Campbells are engaged in other business activities in addition to managing the operations of Inland and Inter-Provincial and difficulty is experienced in determining a proper level of compensation to which they are entitled for the services which they perform for Inter-Provincial.

The evidence adduced indicates they are on call whenever needed to deal with any management problems that may arise in the operation of Inter-Provincial but it has also been established that their diversified activities are such that time is also spent in carrying on their other ventures.

One item of costs which has increased greatly is the amount of premium payable to obtain liability insurance. Mr. Campbell testified that in 1966 a premium of \$300 was paid. He said that by 1970 this premium had increased to over \$600 and the insurer had refused to renew the policy, other than on a short-term basis expiring in September of this year at a premium of \$650 per year. He testified that the best quotation he had obtained at the present time required the payment of a premium of \$2,700 per year.

Mr. Campbell was also subjected to cross-examination by counsel for Wainwright on other items of expense, including the amount paid by Inter-Provincial to provide retirement pensions for its employees and officers.

In Exhibit 2 Inter-Provincial has also included a schedule of expenses which it contends will be incurred in 1972. This schedule of expenses, exclusive of the cost of purchased gas, amortization and depreciation, totals \$54,200. This represents an increase of 54% over the 1966 level found by the Board in decision 27574 representing a compound annual growth rate over the six-year period in the order of 7½%.

From a detailed analysis of the evidence and the schedules which have been filed and after considering the argument of counsel the Board is of the view that the 1971 level of expenses as shown in Exhibit 2 adequately provides for a reasonable increase in expenses over the 1966 level, having regard to such items as insurance and pension contributions. The Board, therefore, has come to the conclusion that the expenses which should be allowed in calculating the revenue requirements of Inter-Provincial should be fixed at \$48,000.

Inter-Provincial urges the Board to make no order directing it to pay the costs of Wainwright, contending that Wainwright itself collects revenue from the rates which it charges its customers in the Town and, therefore, should bear its own costs. The Board rejects this proposal and directs that costs will be paid by Inter-Provincial at such amount as may be agreed to by the parties, such costs being chargeable as an expense by Inter-Provincial amortized over such fiscal periods as may be necessary at the rate of \$1,000 per year. If the parties are unable to reach agreement on the matter of costs then either party may apply to the Board to have them fixed at such amount as the Board may determine.

CHARGES FOR GAS TRANSMITTED TO
THE WAINWRIGHT MILITARY CAMP

Included in the revenue estimated by Inter-Provincial in Exhibit 2 is an item of \$3,000 which represents the charge made to Inland for the gas which Inter-Provincial transports for that company to the Wainwright Military Camp.

In decision 27574 the Board came to the conclusion that the amount which Inter-Provincial should charge for gathering, processing and transporting gas through its facilities should not exceed 13¢ per mcf., such amount being used by the Board in establishing the rate which Inter-Provincial should charge Wainwright and its rural customers.

On the basis of 120,000 mcf. of gas being used by the Military Camp in 1966 a rate of 13¢ per mcf. would produce

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\$15,600. The actual revenue which Inter-Provincial obtained for the year 1966 from this source, as shown in Exhibit 2, was \$4,345, dropping to \$3,040 in 1970 and estimated at \$3,000 for 1971. The amount of gas which Inter-Provincial estimates will be supplied to the Military Camp for the year 1971 is in the order of 75,000 to 80,000 mcf., according to the testimony of Mr. Campbell.

In his testimony Mr. Campbell stated that the transmission of this gas does not represent any additional cost and is entirely an incremental load. He stated that the price currently charged the Military Camp, i.e., 23¢ per mcf. plus \$100 per month service charge, was the price currently being charged to the Camp by Northwestern Utilities, Limited, which also supplies gas to the Camp. He said that if the basis of transportation cost established by the Board in 1966 was continued, this, with an increase in the wellhead price for gas, may render uneconomic the contract which Inland has with the Military Camp, which contract is open for renewal in January 1972.

On cross-examination Mr. Campbell stated the gas delivered to the Military Camp did not have any material effect on the piping system required to supply the Town and, therefore, Wainwright's consumers benefited from any revenue which was paid to Inter-Provincial for transporting the gas to the Military Camp. The Military Camp is located south of the point where the gas supplied to Wainwright is metered. From this point a 4½" pipe line transports the gas south to the Camp. This line, as the Board understands it, is used solely for the purpose of transporting gas used by the Camp whereas the remainder of the system is used for gathering, processing and transporting gas used by the Military Camp; Wainwright; and Inter-Provincial's rural customers.

No evidence was adduced as to the cost of the line used solely to supply the Camp and the cost of the remainder of the system used to supply all customers and the Camp, nor was any evidence adduced as to the load factors involved.

It appears reasonable to believe that Inland, if it wishes to retain the contract which it has with the Camp, must meet the

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company of the size of The Alberta Gas Trunk Line Company Limited.

In the Board's view a reasonable rate of return to Inter-Provincial, having regard to all the circumstances, should be at this time in the order of 9% and this is the rate which the Board finds Inter-Provincial is entitled to on its rate base.

RATES

The rates presently being charged by Inter-Provincial to its customers for the gas which it supplies to them are as follows:

Wainwright

per mcf. 123¢

Rural Customers

Minimum monthly charge
including 3 mcf. of gas \$2.50
Commodity charge per mcf. 38¢

In Schedule "B" to this decision the Board has determined the total revenue requirements of Inter-Provincial at \$117,105. To yield this revenue the Board finds that an increase in rates is required. To provide this level of revenue the just and reasonable rates which the Board fixes are as follows:

Rate to be charged to Wainwright
Gas Company Limited 28.5¢ per mcf.

Rate to be charged to rural
customers

Minimum monthly charge
including 3 mcf. of gas \$2.50
All additional mcf. 44¢ per mcf.

The rates fixed herein shall be effective on all billings on and after September 1, 1971.

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Schedule "C" to this decision sets out the revenue to be provided at these rates based on the volumes of gas estimated to be used by the customers of Inter-Provincial.

DATED AT EDMONTON, in the Province of Alberta, this
Thirty-first day of August, A. D. 1971.

PUBLIC UTILITIES BOARD

(SIGNED) W. NOBBS

CHAIRMAN

(SIGNED) W. D. ABERCROMBIE

MEMBER

Certified a true copy.

Secretary

This is Schedule "A" to Decision No. 30313 of the Public Utilities Board, dated the 31st day of August, 1971, in the matter of an application by Inter-Provincial Gas Company (1964) Limited for a revision of its rates.

SCHEDULE OF RATE BASE AND RATE OF RETURN

	<u>1970</u>	<u>1971</u>
Plant, property and equipment as at December 31	\$160,876	\$163,876
Accumulated amortization (depreciation)	<u>48,305</u>	<u>56,000</u>
Net Plant, property and equipment balance	<u>\$112,571</u>	\$107,876
Prior year balance		<u>112,571</u>
		<u>\$220,447</u>
Mid-year balance		\$110,224
Working capital allowance		<u>5,000</u>
Mid-year rate base		<u>\$115,224</u>
Allowed return 9%		<u>\$ 10,370</u>

This is Schedule "B" to Decision No. 30313 of the Public Utilities Board, dated the 31st day of August, 1971, in the matter of an application by Inter-Provincial Gas Company (1964) Limited for a revision of its rates.

SCHEDULE OF REVENUE REQUIREMENTS

	<u>1971</u>
Expenses	\$ 48,000
Amortization (depreciation)	7,695
Gas purchases	
392,000 mcf. @ 12¢	47,040
Allowed rate of return	<u>10,370</u>
	\$113,105
Estimated income tax	<u>4,000</u>
Total revenue requirements	<u><u>\$117,105</u></u>

This is Schedule "C" to Decision No. 30313 of the Public Utilities Board, dated the 31st day of August, 1971, in the matter of an application by Inter-Provincial Gas Company (1964) Limited for a revision of its rates.

SCHEDULE OF RATES TO BE LEVIED ON CUSTOMERS

Rural customers

Minimum monthly charge including 3 mcf. of gas at \$2.50 per month	\$ 840
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All additional gas at 44¢ per mcf. 6,000 mcf. at 44¢	2,640
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\$3,480

Transmission line revenue for gas transported to the Military Camp	4,000
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Wainwright Gas Company Limited 385,000 mcf. @ 28.5¢ per mcf.	109,725
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109,725

Total estimated revenue for the year 1971	\$117,205
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\$117,205

NO. 30314



File: Ex-Co-25-16

IN THE MATTER OF "The Pipe Line
Act"; and

IN THE MATTER OF "The Expropriation
Procedure Act"; and

IN THE MATTER OF an application
to the Public Utilities Board by
Imperial Oil Limited for an order
granting to the Applicant a right-
of-way 50 feet in width over, across
and under certain lands for the
purpose of constructing and maintain-
ing a petroleum products pipe line
and fixing the amount payable by the
Applicant for such interest and for
incidental damages and costs.

BETWEEN:

IMPERIAL OIL LIMITED

Applicant

- and -

FREDERICK BALL, ARTHUR BALL, FARM CREDIT
CORPORATION, ALBERTA FARM PURCHASE BOARD
AND MILLARVILLE RURAL ELECTRIFICATION
ASSOCIATION LIMITED

Respondents

APPEARANCES:

R. B. Dawson, Esq.	:	for Imperial Oil Limited
	:	
A. D. Hunter, Esq.	:	for Frederick Ball and
	:	Arthur Ball

D E C I S I O N

This is an application by Imperial Oil Limited
(hereinafter referred to as "the Applicant") to the Public
Utilities Board for an order declaring the estate or interest
to be granted to the Applicant over, across and under certain
lands owned or being purchased by Frederick Ball and Arthur
Ball (hereinafter referred to as "the Respondents") for
the purpose of constructing and maintaining a petroleum
products pipe line and fixing the amount of money payable

by the Applicant for such interest and for incidental damages and costs.

The land required for the right-of-way is described as follows:

A strip of land 50 feet in uniform width throughout situate in the East Half of Section Fifteen (15), the East Half of Section Twenty-two (22) and the South Half and North West Quarter of Section Twenty-seven (27), all in Township Twenty-one (21), Range Four (4), West of the Fifth Meridian, in the Province of Alberta, containing 17.91 acres more or less;
RESERVING thereout all Mines and Minerals.

The right-of-way is delineated on a plan registered in the Land Titles Office for the South Alberta Land Registration District as Plan 7679 J.K.

The original authorization for the Applicant to enter upon the land for the purpose of commencing construction was granted by the Board by its Interim Order No.29810, dated April 21, 1970, and this date, accordingly, becomes the effective date of the expropriation.

On the application for a vesting and compensation order, which was heard at the Court House in Calgary, Alberta, on May 12, 1971, the Applicant, with the consent of the Respondents, applied to have their original Application amended so as to delete therefrom any reference to the South East Quarter of Section 27. This application was granted and the total right-of-way acreage, with which the Board is obliged to deal, is, accordingly, reduced to 17.90 acres.

The subject property was described as being located approximately nine to ten miles west and slightly north of the Hamlet of Millarville and is bounded on the East and on the North boundary by a good gravel road. It is situated mainly

along the easterly base of a high ridge which runs generally in a north-south direction through the area. In addition to this ridge there is a rather high knoll located in Section 27. This knoll rises gently from the south and drops off quite abruptly on the north end thereof, a short distance south of the road. While a good view of mountains may be obtained from a number of locations on the right-of-way, a very attractive view is presented on looking to the south and east. Each of the subject quarters has a supply of fresh water in the form of flowing springs or creeks and the Respondents have left uncut a certain amount of natural tree growth in an effort to preserve the natural beauty of the property.

The pipe line right-of-way enters the subject property at the south end thereof to the east of and adjacent to the west boundary of the South East Quarter of Section 15 and continues almost due north along the same line until it reaches the south boundary of Section 27, where it swings gently to the north west and then back again to the north east so as to travel along the base of the knoll which is located in that section. In traversing the property, it was stated that the 17.9 acres of right-of-way crossed - starting from the south - 1/2 mile of hay land, 1/2 mile of pasture that had been cleaned, 1/2 mile of bush pasture, with the balance being comprised of range land.

Mr. N. T. J. McNally, a land consultant and appraiser called by the Applicant, expressed the opinion that the market value of the subject property, as of June, 1970, was \$160.00

per acre. In support of this opinion he listed in his Appraisal Report, a copy whereof was duly filed as Exhibit 16-6, the particulars of the sales of six parcels of comparable farm lands which had taken place in the general area. He was further of the opinion that the highest and best use of the land was its present use, which was for agricultural purposes until such time as it could be disposed of on a uniform basis for the purposes of country or small holding requirements. He felt that, because of the location of the property and the large number of parcels available closer to the City of Calgary, subdivision of the subject property in this manner was not likely to take place for some years to come.

During cross-examination Mr. McNally was questioned about a sale of 82 acres, more or less, in the South Half of Section 4, Township 21, Range 4, West of the 5th Meridian, and about a sale of 29.48 acres in the south west corner of the South West Quarter of Section 13, Township 21, Range 4, West of the 5th Meridian. He stated that he was aware of the purchase by Imperial Oil Enterprises Ltd. of part of the South Half of Section 4 for a plant site during or prior to August, 1970, but advised that he had no information regarding the sale of the 29.48 acres in the South West Quarter of Section 13. This latter sale apparently took place during the month of May, 1971, approximately two months after his report was prepared, and about one year after the effective date of the expropriation. He stated that the zoning of the subject property would permit subdivision of it into 20 acre parcels but that the developer would be obliged to donate 10% of his land for Crown reserve and provide for suitable roads and approaches with proper

drainage. He stated further that within a radius of from 9 to 10 miles from the subject property there were several 20 acre country residential subdivisions near each of the communities of Bragg Creek, Millarville and Priddis.

Mr. D. J. Rollheiser, a real estate agent, was called to give evidence on behalf of the Respondent. He advised that he had been in the real estate business for over seven years and that the great majority of his work involved the sale and purchase of farm land in the area west of No. 2 Highway from Cochrane south to Lundbreck and in the general vicinity of High River and Okotoks. Mr. Rollheiser stated that, in his opinion, the highest and best use of the subject property was for small holdings and country residential development. He felt that, if subdivided into 20 acre parcels, the lands located in Sections 15 and 22 would sell within one year for \$400.00 per acre and the land in Section 27 for \$500.00 per acre. He considered a higher price would be obtained for the property in Section 27 primarily because it was provided with a better water supply and with better access. In support of this opinion Mr. Rollheiser relied mainly on the two sales referred to during the cross-examination of McNally. He was also of the opinion that, because of the acquisition of the right-of-way by the Applicant and the location thereof across the property, the value of each quarter section was thereby lessened. On being asked to what extent the property was devalued he stated:

" You go by percentage - everything is percentage, its the most progressive way to do things and injurious affection, if a line goes on the boundary you'll have a 5% devaluation. If it goes through the - - from corner to corner or across a quarter section it should be a 10%. If it goes on a point of entry it should be 2½% and I've maintained this all along."

This expression of opinion was not supported by examples of sales of land crossed by a single pipe line, although reference was made to the depressed selling price of some parcels which were encumbered by pumping stations, flare sites, warning signs and other "junk" - to use his expression. Mr. McNally felt that the right-of-way had been located in a position which would cause a minimum amount of damage in the event of subdivision. He would not agree that parcels containing oil or gas rights-of-way must necessarily bring a smaller price on the market than similar parcels unencumbered in that manner.

The Board has examined carefully the particulars of the sales referred to or relied on by each of the land appraisers and has paid special attention to the details of the sale of the 29.48 acres in the South West Quarter of Section 13. This sale, although it took place about one year after the expropriation date, would appear to indicate that purchasers are considering the general area when searching for small holdings. The Board appreciates that, while the subject property has a definite potential for subdivision into small parcel holdings, it was not and is not now so subdivided and some relatively heavy expense would be involved in the design and registration of an appropriate plan of subdivision. After considering all of the evidence the Board is of the opinion that the value of the land in the subject property as of April, 1970, was as follows:

land in Sections 15 and 22 - \$300.00 per acre; and
land in Section 27 - \$350.00 per acre.

Having found that the subject property has a definite potential for subdivision the Board must then turn its attention to what award, if any, should be made for injurious affection. In this regard the Board cannot accept, without specific evidence of sales to support it, the percentage theory advanced by Mr. Rollheiser. After considering the placement of the right-of-way on the subject property in relation to its adverse effect on a future subdivision, the Board has concluded that an award in the sum of \$1,500.00 will adequately compensate the Respondents for this item of their claim.

On considering the matter of damages generally, the Board is of the opinion that the Respondents were justified in making a claim under each of the heads of damage particularized in their claim (Exhibit 16-11) but is not satisfied that, in every instance, the figures submitted for time lost, value of feed and for work done or to be done are reasonable. This is particularly true where it appears that the claim for loss of pasture is based on the same figures as is the claim for loss of hay. Adjustments have been made in various of the figures submitted and an award in the sum of \$2,578.00 will be made to cover all items of damage with the exception only of the claim for injurious affection, for which a separate allowance has been made.

Concurrently with this decision the Board will issue its order declaring the interest in land granted to the Applicant and the compensation and damages awarded to the Respondents.

The Respondents are also awarded interest at the rate of 7% per annum on such award from the date of the Interim Order to the date hereof.

Costs will be awarded to the Respondents at such amount as may be agreed upon between the parties, failing which, at such amount as may be fixed by the Board.

DATED AT EDMONTON, in the Province of Alberta, this
12th day of October, 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) K. J. LEATHEM

MEMBER

(SIGNED) H. A. WILLIAMS

ACTING MEMBER

Certified a true copy.

Secretary

NO. 30320



File: Ex-Co-25-20

IN THE MATTER OF "The Pipe Line
Act"; and

IN THE MATTER OF "The Expropriation
Procedure Act"; and

IN THE MATTER OF an application to
the Public Utilities Board by
Imperial Oil Limited for an order
granting to the Applicant a right-
of-way 50 feet in width over, across
and under certain lands for the
purpose of constructing and maintain-
ing a petroleum products pipe line
and fixing the amount payable by the
Applicant for such interest and for
incidental damages and costs.

BETWEEN:

IMPERIAL OIL LIMITED

Applicant

- and -

LOUIS ELLIS COPITHORNE, THE ALBERTA
GAS TRUNK LINE COMPANY LIMITED, MONTREAL
TRUST COMPANY, ROYAL TRUST COMPANY AND
ROYALITE OIL COMPANY LIMITED

Respondents

APPEARANCES:

R. B. Dawson, Esq. : for Imperial Oil Limited
:
A. D. Hunter, Esq. : for Louis Ellis Copithorne

D E C I S I O N

This is an application by Imperial Oil Limited
(hereinafter referred to as "the Applicant") to the Public
Utilities Board for an order declaring the estate or interest
to be granted to the Applicant over, across and under certain
lands owned by Louis Ellis Copithorne (hereinafter referred
to as "the Respondent") for the purpose of constructing and
maintaining a petroleum products pipe line and fixing the
amount of money payable by the Applicant for such interest
and for incidental damages and costs.

The land required for the right-of-way is described as follows:

A strip of land 50 feet in uniform width throughout situate in the North West Quarter of Section Twenty-seven (27), the South West Quarter of Section Twenty-seven (27) and the North West Quarter of Section Twenty-two (22), all in Township Twenty-four (24), Range Four (4), West of the Fifth Meridian, in the Province of Alberta, containing 9.11 acres more or less;

RESERVING thereout all Mines and Minerals.

The right-of-way is delineated on a plan registered in the Land Titles Office for the South Alberta Land Registration District as Plan 7868 J.K.

The original authorization for the Applicant to enter upon the land for the purpose of commencing construction was granted by the Board by its Interim Order No.29888, dated June 19, 1970, and this date, accordingly, becomes the effective date of the expropriation.

The subject property was described as being located approximately thirteen miles west of the City of Calgary or about 1-1/4 miles south and 1/2 mile west of the Cochrane-Bragg Creek Interchange on Highway No. 1. A good gravel road runs in an east-west direction between Section 22 and Section 27 and an undeveloped road allowance runs along the west boundary of each quarter section.

The North West Quarter of Section 22 is fairly level and has all been seeded to tame hay except for a low lying area in the south-west corner thereof. There is a small stand of spruce trees located near the center of the quarter and a few other spruce trees are scattered over the remaining area. An excellent view may be obtained to the south-west and a fair view of the mountains can be had, particularly along the west side of the quarter section where the ground is

higher. Power and gas are readily available but water would have to be obtained from drilled wells.

The West Half of Section 27 has been left in its native state. A good cover of willow brush, with some poplar trees, provide an excellent shelter for cattle. The natural run-off draw located in the North West Quarter of the section runs generally to the east and slightly to the south into the South East Quarter. This parcel was used as a pasture and winter feed ground. Power and gas are available and there are a number of drainage springs located on the property. A scenic view of the mountains may be obtained from the west side of the South West Quarter of the section.

The pipe line right-of-way enters the subject property at the south end thereof 20 feet distant east from the west boundary of the North West Quarter of Section 22 and continues due north along the same line until it reaches the north boundary of Section 27. In traversing the property, it was stated that the 9.11 acres of right-of-way crossed approximately 0.28 acres of low lying land and 2.75 acres of cultivated hay land in the North West Quarter of Section 22. In Section 27 the right-of-way crossed 6.08 acres of native land with medium to heavy willow cover for the most part.

Mr. N. T. J. McNally, a land consultant and appraiser called by the Applicant, expressed the opinion that the market value of the subject property, as of June, 1970, was \$325.00 per acre. In support of this opinion he listed in his Appraisal Report, a copy whereof was duly filed as Exhibit 20-3, the particulars of the sales of four parcels of comparable farm land which had taken place in the general area. He was further of

the opinion that the highest and best use of the land was its present use, which was for agricultural purposes until such time as speculative purchases or small holding development reached the area of the subject property on a definite basis. He felt that, because of the location of the property and the large number of parcels closer to the City of Calgary, subdivision of the subject property in this manner was not likely to take place for some years to come. During cross-examination Mr. McNally was questioned about a number of sales and, in conclusion, conceded that the relatively high price being paid for agricultural lands reflected the speculative value which extended over the general area due to the influence of the proximity of the City of Calgary.

Prior to calling Mr. Copithorne to the stand counsel for the Respondent tendered in evidence, as Exhibit 20-5, a type-written memorandum entitled "Agreed Specific Items of Damage." This memorandum sets forth the particulars of those items of damage which the parties had been able to agree on, amounting to the sum of \$1,625.95.

On taking the stand, the Respondent gave a verbal description of the subject properties and then explained the manner in which the cattle shelter on Section 27 had been damaged. He estimated that he had lost a strip of willow brush for a distance of approximately $\frac{3}{4}$ of a mile along the west boundary of the section or, roughly, 3 acres of shelter. He said that winter shelter was very important for the protection and well being of cattle, particularly during calving time, and that he had suffered a definite loss but, because of the abundance of shelter left on the section, was not able to quantify this loss in dollars and cents. He felt

that the shelter could only be replaced by a board fence and advised the Board that the cost of material to construct an 8 foot high solid plywood fence for a distance of 1,200 feet would amount to \$1,709.25. In addition to the cost of lumber, labour would have to be charged for at the rate of between \$1.25 and \$1.50 per lineal foot.

He advised that, although he received inquiries every year, he did not wish to sell and had not sold any small acreage parcels out of his holdings. Shortly before Christmas, in 1970, however, he had been approached by the representative of a group of businessmen who indicated that the group would like to construct a sports complex on the North Half of Section 27. In this regard, a tentative offer was made to purchase approximately 320 acres for the sum of \$300,000.00. He stated that if the group was able to obtain the necessary clearances from the Municipality and the Planning Board and arrange for the relocation of a condensate pipe line, he would accept a firm offer and endeavour to obtain other land to replace the acreage sold. A copy of the tentative plan of the proposed development, which he received during the month of February, 1971, was entered as Exhibit 20-6.

Mr. D. J. Rollheiser, a real estate agent, was called to give evidence on behalf of the Respondent. It was agreed by counsel that he was a duly qualified real estate broker having particular knowledge of the value of the subject property and other lands in the general area. On being asked to comment on the subject property, Mr. Rollheiser stated that it was important, when endeavouring to assess the value thereof, that the following items be considered, namely:

that Section 27 contained a number of drainage springs;

that all utilities go into or border on Section 27;

that a legal road allowance runs along the west boundary of the subject property;

that such property is located 13 miles from the City of Calgary and only about 6 miles from the community of Springbank;

that a school and recreation center are located at Springbank, together with an airport and a golf course.

He stated further that the 4 or 5 poplar trees and the willow brush on Section 27, not generally found on lands located farther to the north, added an aesthetic value to the property. Mr. Rollheiser said that, in his opinion, the highest and best use of the subject property was for small holdings and country residential development. He felt that, if the subject property was divided into 20 acre parcels, which existing zoning regulations permitted, the choice parcels would sell for \$800.00 per acre and other parcels from \$50.00 to \$100.00 per acre less, depending on where they were located in the subdivision. He stated that the choice parcels would be those which were located adjacent to a road allowance and were possessed of such amenities as utilities, mountain view and springs. Such parcels, he said, could be found along the most westerly portion of the North West Quarter of Section 22 and the South West Quarter of Section 27. In support of this opinion Mr. Rollheiser relied mainly on the four sales of property that he had located with an "X" on a copy of part of a municipal map, which was entered as Exhibit 20-7. He advised that he was relying only on the four sales indicated because there was too much extensive data available, there being over 129 parcels subdivided in the area. He considered that, as of June, 1970, 20 acre parcels

taken out of the subject property with good locations would sell for \$750.00 per acre and those with poorer locations would sell for from \$600.00 to \$650.00 per acre.

Mr. Rollheiser was also of the opinion that land in the general area of the subject property was appreciating in value because of the City influence and the proximity to Springbank. He felt that this type of land afforded the best investment for small holdings. He indicated that the construction of the pipe line would separate the subject property from the road allowance to the west and the granting of a right-of-way for the line would mean a loss of rights to the owner. In addition, prospective purchasers did not like to see warning signs on the property in which they were interested. For these reasons he considered that the value of the subject property had been decreased by 5% as a result of the construction of the pipe line. This expression of opinion was not supported by examples of sales of land carrying a pipe line.

Mr. McNally, on the other hand, felt that the right-of-way had been located in a position which would cause a minimum amount of damage in the event of subdivision. Because municipal regulations prohibited the erection of buildings within 125 feet of a road allowance the placement of the right-of-way on the property would have no effect on the possible location of buildings.

The Board has examined carefully the particulars of the sales relied on by each of the land appraisers and has paid particular attention to the details of the sale of the smaller sized parcels referred to. The Board appreciates that, while the subject property has a definite potential for subdivision

into small parcel holdings, it was not and is not now so subdivided and some relatively heavy expense would be involved in the design and registration of an appropriate plan of subdivision. After considering all of the evidence the Board is of the opinion that the average value of the land in the subject property in June, 1970, was \$500.00 per acre.

Having found that the subject property has a definite potential for subdivision the Board must then turn its attention to what award, if any, should be made for injurious affection. In this regard the Board cannot accept, without specific evidence of sales to support it, the percentage theory advanced by Mr. Rollheiser. After considering the placement of the right-of-way on the subject property in relation to its adverse effect on a future subdivision, the Board has concluded that an award in the sum of \$2,500.00 will adequately compensate the Respondent for this item of his claim.

The evidence with respect to the quantum of loss suffered by the Respondent resulting from the destruction of a relatively small percentage of his cattle shelter on Section 27 is not conclusive. The Board is not satisfied that the Respondent will attempt to replace the willow brush with a solid plywood, or any other type of fence and, bearing in mind that the property, in the not too distant future, may be put to a higher and better use than pasture and winter feeding grounds, the Board considers that an award in the sum of \$500.00 will constitute reasonable compensation for this item of claim.

Concurrently with this decision the Board will issue its order declaring the interest in land granted to the Applicant

and the compensation and damages awarded to the Respondent.

The Respondent is also awarded interest at the rate of 7% per annum on such award from the date of the Interim Order to the date hereof.

Costs will be awarded to the Respondent at such amount as may be agreed upon between the parties, failing which, at such amount as may be fixed by the Board.

DATED AT EDMONTON, in the Province of Alberta, this 12th day of October, 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) K. J. LEATHEN

MEMBER

(SIGNED) H. A. WILLIAMS

ACTING MEMBER

Certified a true copy.

Secretary

NO. 30331



File: 4879-A

IN THE MATTER OF "The Municipal
Government Act": and

IN THE MATTER OF "The Public Utilities
Board Act": and

IN THE MATTER OF an application by the
Town of High Prairie to the Public
Utilities Board for an order fixing
the price and terms of purchase of all
the rights, apparatus and property of
Northland Utilities Limited under a
natural gas franchise agreement dated
the 11th day of May, 1959; and for the
consent to the purchase thereof by
the Town.

BETWEEN:

THE TOWN OF HIGH PRAIRIE

- Applicant

- and -

NORTHLAND UTILITIES LIMITED

- Respondent

APPEARANCES:

W. H. Hurlburt, Esq., Q.C. : for the Applicant

B. V. Massie, Esq., Q.C. : for Northland Utilities
Limited

D E C I S I O N

This is an application to the Public Utilities Board by the Town of High Prairie (hereinafter referred to as "the Town") pursuant to the provisions of The Municipal Government Act, Chapter 246, Revised Statutes of Alberta 1970, for the purpose of obtaining the consent of the Board to the purchase by the Town of the rights, apparatus and property of Northland Utilities Limited (hereinafter referred to as "the Company") on the expiration of a natural gas franchise agreement made between the Town and the Company. The agreement, dated May 11, 1959, expired at the end of the ten year term. The Town and the Company entered into negotiations for the purchase by the Town of the facilities of the Company that are used to supply gas to the Town. These negotiations were unsuccessful, resulting in the present application.

Clause 15 of the agreement provides for renewal or alternatively for the Town to purchase the Company's rights and property in the following terms:

"15. It is further agreed that at the expiration of the term hereof this contract may be renewed for a period not exceeding ten (10) years (and so on from time to time) with such alterations, if any, as may be agreed upon by the parties and approved by the Board of Public Utilities Commissioners, and that if either party refuses to renew such contract, or if the parties fail to agree as to the conditions of such renewal, then the Town may purchase all the rights of the Company within the Town limits in all matters and things under contract, and in all apparatus and property situated within the Town limits for the purpose of supplying gas to the inhabitants of the Town for such a price and on such terms as may be agreed upon with the Company, or failing such agreement, then for such price and on such terms as may be fixed by the Board of Public Utilities Commissioners on the application of either of the parties hereto, but nothing shall be claimed by or paid to the Company for any and all franchise or franchises received from the Town."

Section 272 of The Municipal Government Act, under which the present application is made reads:

"272. (1) Application for the approval by the Public Utilities Board of any special franchise or other contract entered into pursuant to section 271 or pursuant to a municipal charter, or any renewal thereof as hereinafter provided, shall be made to the Board prior to or forthwith after the first reading of the by-law.

(2) Any such contract, whether or not it contains an express provision to that effect, is subject to the following conditions, namely,

- (a) that at or before the expiration of the term thereof, and after the expiration of the term if the contract has been continued in force under subsection (3), the contract may be renewed for a period not exceeding 10 years from the date of the renewal and so on from time to time with such alterations, if any, as may be agreed upon by the parties and approved by the Public Utilities Board, and
- (b) that, if either party refuses to renew the contract, or if the parties fail to agree as to the conditions of the renewal, then the council, subject to the consent of the Public Utilities Board, may purchase all the rights of the contractor in all matters and things under the contract and in all apparatus and property used for the purposes thereof, for such price and on such terms as may be agreed upon with the contractor in all matters and things under the contract and in all apparatus

"and property used for the purposes thereof, for such price and on such terms as may be agreed upon with the contractor, or failing such agreement, then for such price and on such terms as may be fixed and settled by the Public Utilities Board on the application of either of the parties.

(3) If any such contract is not renewed on or before the expiration of the original term, or of any renewal thereof, by express agreement of the parties as aforesaid, or if the council does not complete the purchase of the subject matter thereof as hereinbefore provided, then the contract continues in full force and effect until such time as either party terminates it on six months' written notice given to the other with the approval of the Public Utilities Board.

(4) "

Although the Town has applied to have the price of the Company's facilities fixed and to obtain the consent of the Board to purchase the facilities in one application, the Board has jurisdiction to fix and settle the terms and price before the Town decides whether or not it will exercise its right to purchase. This procedure is provided by Section 28 (3) of The Public Utilities Board Act as follows:

"28.(3) The Board has, and shall be deemed at all times to have had, jurisdiction to fix and settle, upon application, the price and terms of purchase by a council of a city, town, village, municipal district or county, as the case may be, pursuant to section 272, subsection (2), clause (b) of The Municipal Government Act

- (a) before the exercise by the council under any of those provisions of its right to purchase and without binding the council to purchase, or
- (b) where an application is made under any of those provisions for the Board's consent to the purchase, before hearing or determining the application for its consent."

This procedure was approved by the Appellate Division in *Northland Utilities Limited v Grande Prairie* (1966) 56 W.W.R. 613 at p. 620 - 621.

This decision will be concerned only with the determination of price and the question of consent will be dealt with on a further application if the Town decides it wishes to purchase the facilities.

* * * * *

The Company's facilities are divided into three areas in

the reports prepared by both parties. For convenience of reference these areas are: area I, the distribution system within the Town limits; area II, facilities to serve some customers lying outside the Town limits which are connected to the distribution system; area III, the transmission system which delivers gas from wells located north of the Town to the Town limits.

Counsel for both the Town and the Company agree that the facilities in area II outside the Town should be considered as part of the Town's distribution facilities in area I, but at the present time there is no agreement about the transmission line in area III. Counsel for the Town suggested that the Board should fix a price for the facilities in the three areas in this application on the understanding that if the Town elected to purchase at that price, the Board would, before the application for consent to purchase, hear argument and determine the rights of the Town to purchase the transmission facilities which lie outside the Town limits. Counsel for the Company did not wish to be put in the position of saying whether he agreed that the Town had the right to purchase the transmission line at this time before the Town had made its election to purchase but the Company does not object to the Board valuing all the facilities.

The Board doubts that it has jurisdiction to determine any question between the parties beyond fixing the price of the facilities but it is not necessary to consider the matter for the purposes of the present application.

* * * * *

Generally speaking, the parties agree as to the quantities and prices of materials but the main issue appears to be the cost of construction. There is also disagreement as to the

type of pipe coating to be valued; whether the cost of breaking and replacing pavement is to be allowed; and the number of river crossings involved. With respect to the transmission line, there is disagreement over the wall thickness of pipe to be valued. There is also an issue with respect to the cost of electric power for wellhead heating or whether a lower cost substitute should be allowed. Also, the parties do not agree on the method of determining the depreciation of the Company's facilities.

In Decision 27014, dated June 15, 1965, which arose from an application by the City of Grande Prairie to fix the price for the purchase of Northland Utilities' gas facilities in that city, after reviewing the authorities the Board discussed the method of valuation for fixing the price as follows:

".....Referring back to the summation of Wilson J. of the English and Canadian cases, (in re West Canadian Hydro Electric Corporation Limited (1950) 3 D.L.R. 321) it appears to the board that this is a case where only physical structures without any franchise, or statutory powers or other things necessary to earning capacity are being taken and accordingly reproduction cost is the test of value and consideration of earnings must be excluded."

The Board in its decision described the method in the following words:

".....Under this concept the assumption is taken that the present existing installation is instantaneously wiped out and at the date of the valuation a contractor is ready and able to rebuild a system identical in size, quality and performance to the one wiped out.

Accordingly, therefore, the cost of materials would be the price that would be paid at the date of the valuation for quantities sufficient to reconstruct the system at that time."

Decision 27014 was approved by the Appellate Division in Northland Utilities Limited v Grande Prairie (supra) where McDermid J.A., who gave the majority judgment of the Court, quoted the following dictum of Lord Macmillan in the judgment of the Judicial Committee in re International Railway Company and Niagara Parks Commission (1937) 2 W.W.R. 641, at p. 652:

" In the present case the agreement expressly stipulates that the company are not to be compensated 'in respect of any franchises for holding or operating' their railway. That is to say, they are to receive nothing in respect of the loss of the right to make profits which the franchise conferred upon them. The effect of these words is equivalent to the exclusion of any allowance for past or future profits. As the dissentient arbitrator states: 'A long line of cases has approved this (i.e., the principle of reconstruction cost less depreciation) as a correct method of valuing a public utility where the value of the franchise is excluded from consideration.'"

In a later Decision, 30087, in re the City of Camrose v Calgary Power Ltd., dated December 11th, 1970, which dealt with the valuation of a waterworks system, the Board said:

" In the Grande Prairie case, supra, the Board determined that the cost of materials would be the price that would be paid at the date of the valuation for quantities sufficient to reconstruct a system identical in size, quality and performance to that which is under consideration. This is not to say, however, that this precludes, in the valuation process, the substitution of other parts or material which can be purchased today for that which is now no longer available. As was said by the arbitrators in City of Toronto and Toronto Railway Company, affirmed on reference to the Judicial Committee (1924) 4 D.L.R. 1001:

' In cases of parts or articles connected with plant in situ which, although useful, are not now being manufactured, value may be estimated by reference to prices of parts and articles which can be bought today, taking into account, of course comparative utility, depreciation and all other relevant considerations.'"

In the two previous decision of this Board just mentioned, the Board applied the reconstruction cost less depreciation method to value the utilities as it was considered most appropriate for those particular utilities. However, it is clear from the authorities that reproduction cost less depreciation is not the only proper method and the Board must have regard to all relevant factors when considering value. The best statement on the broad approach to valuation that the Board has found is contained in the judgment of The Judicial Committee in City of Toronto and Toronto Railway

Company (supra) which was briefly quoted from in the Board's decision 30087. On page 1008 of the Toronto decision, Viscount Cave said, quoting from the arbitrator's reasons:

"Speaking generally, we have had before us an immense amount of evidence dealing with the suitability, physical condition, depreciation, original cost of construction or purchase price, cost of reproduction and overhead costs connected with reproduction, of all the properties, real and personal, taken over by the city. All this evidence has been considered in its bearing upon the question of value. In this connection we have kept before us the language of the Judgment of the Honourable Chief Justice Meredith delivered December 16, 1921, upon a case stated by the Board for the opinion of the Court upon a point as to the relevancy of certain evidence. He says:- 'There is no law which limits arbitrators to one method of determining value; any and every method that may be helpful may be applied. Actual cost, reproduction cost and market value - direct or indirect - or actual value, may each and all give assistance; or only one may be useful, according to the nature and circumstances of the particular enquiry.'"

(underlining added)

and at page 1011:

". No doubt they (the arbitrators) took reproduction cost less depreciation as affording a serviceable guide in valuing the track, rolling-stock, and buildings; and in this they were fully justified by the authorities cited. Indeed it is difficult to see how such items as fixed plant in situ, car-barns, car-construction and repair shops, sub-stations and the machinery which they contain, could have been valued except with the assistance of some such principle. But the arbitrators were careful to make it clear that they had by no means adopted reproduction cost less depreciation as the only and sufficient test of value. In valuing the track and other plant in situ they allowed (as the above quotations show) not only for wear and tear, but for 'obsolescence,' and had regard to good practice in railway administration and to s.4 (4) of the Act, and also to comparative utility and other relevant considerations. So, in valuing rolling-stock, they gave due weight to character, obsolescence and alleged defects and advantages from the operating standpoint; and with regard to buildings, suitability and other matters bearing upon their value were plainly not neglected. If the statements made by the arbitrators in the reasons for their award as to the method which they had adopted in making their valuation are accepted as correct - and there is no reason whatever for not so accepting them - it will appear that they not only proceeded on lines which had been approved by many decisions of the House of Lords and of this Board, but gave due weight to the special provisions of the Act of 1892 and to all the circumstances of the case. This contention therefore fails."

(underlining added)

Expert witnesses were called by the Town and the Company to present evidence in support of their respective valuations. The witnesses called by the Company were:

RONALD N. DALBY, P. Eng. - Vice-President of Northland Utilities Limited in charge of supervising the economics of providing service to new communities and large industrial users, rate administration, negotiating on new franchise agreements, franchise renewals and large industrial sales contracts.

JERRY R. VAN DER LINDEN, P. Eng. - Manager of Marketing, Gas division for Northland Utilities, who was previously a construction inspector with the Company.

JAMES LESLIE, P. Eng. - Assistant Manager, Economics and Valuation division, Montreal Engineering Company, Limited, Consulting Engineers.

DR. SAMUEL A. BRADFORD - Associate Professor of Metalurgy, University of Alberta.

JAMES HENRY PLETCHER, P. Eng. - Vic-Presidence of gas supply for Northland Utilities Limited.

ROBERT WILLIAMS, P. Eng. - Chief Geologist responsible for the geological evaluation of gas reserves of Northland Utilities and for the exploration for and development of new gas reserves.

JAMES P. FORD - Chief Engineer, Banister Pipelines Limited.

CARL WANDLER - Manager, Pipeline division, Square M. Construction.

The witnesses called for the Town were:

WAZIR C. SETH - an Engineer employed by McDaniel Consultants (1965) Limited mainly with oil and gas reservoir evaluations.

ERIC GEDDES - A Fellow of The Institute of Chartered Accountants of Alberta.

JOHN BRUCE PALMER, P. Eng. - Consulting Engineer.

JOHN E. FLAVIN, P. Eng. - Consulting Engineer.

WILLIAM H. SEAGER, P. Eng. - Consulting Corrosion Engineer.

The Company and the Town had valuations prepared of the systems in the three areas, the effective date of the valuations being December 31, 1970. The Company values the entire system at \$734,000; the Town values it at \$306,800.

The Town's valuation, Exhibit 9, is based on the same quantities of material used in the Company's valuation. The Company provided this information to the Town for the purposes of this hearing.

The Company's valuation, Exhibit 3, entitled "Determination of The Reconstruction Cost New of The High Prairie, Alberta, Natural Gas Production, Transmission and Distribution Systems", values the reconstruction cost new of the facilities at \$713,397.00. This value which does not provide for depreciation and other items which must be included for depreciation is summarized in the report as follows:

NORTHLAND UTILITIES LTD.

HIGH PRAIRIE VALUATION

SUMMARY

	<u>AREA I</u>	<u>AREA II</u>	<u>Sub-total</u>	<u>AREA III</u>	<u>Total</u>
<u>APPARATUS</u>					
Mains	\$192,664	\$14,343	\$207,007	\$273,537	\$480,544
Services	93,795	5,467	99,262	4,941	104,203
Meters	77,789	4,451	82,240	770	83,010
Regulation Station	10,435		10,435		10,435
Wellhead Equipment				33,412	33,412
Cathodic Protection	925		925	868	1,793
TOTAL R.C.N.	\$375,608	\$24,261	\$399,869	\$313,528	\$713,397

The value of other plant items which would go with the above facilities was summarized on a current or market value basis as follows:

MARKET VALUE

<u>Other Plant</u>	<u>AREA I</u>	<u>AREA II</u>	<u>Sub-total</u>	<u>AREA III</u>	<u>Total</u>
Property (Land Rights)	\$4,440	\$ 252	\$4,692	\$13,450	\$18,142
Stock Inventory	3,000		3,000		3,000
Loose tools & Equipment	750		750		750
Mechanized Equipment	631		631		631
Power Lines				5,870	5,870
Roads				10,000	10,000
Total Market Value of Other Plants	\$8,821	\$ 252	\$9,073	\$29,320	\$38,393

The Company's valuation of \$734,000 for the total reconstruction cost new of the plant with a deduction for loss in value and the addition of other items is given in a separate summary, Exhibit 5:

NORTHLAND UTILITIES LTD.

HIGH PRAIRIE VALUATION

	<u>DISTRIBUTION</u>			<u>PRODUCTION AND TRANSMISSION</u>	
	<u>AREA I</u>	<u>AREA II</u>	<u>TOTAL I & II</u>	<u>AREA III</u>	<u>TOTAL SYSTEM</u>
Reconstruction Cost New	\$375,600	\$24,300	\$399,900	\$313,500	\$713,400
Loss in Value	23,400	1,000	24,400	16,800	41,200
Reconstruction Cost New Less Loss in Value	\$352,200	\$23,300	\$375,500	\$296,700	\$672,200
Other Plant Items at Market Value	8,800	300	9,100	29,300	38,400
SUB TOTAL	\$361,000	\$23,600	\$384,600	\$326,000	\$710,600
<u>OTHER CHARGES</u>					
Books and Records			6,300	5,100	11,400
Accounts Receivable			11,700	300	12,000
TOTAL			\$402,600	\$331,400	\$734,000

- 11 -

The valuation made by Mr. J. B. Palmer for the Town follows the same format as the Company's valuation with respect to the three areas which comprise the total system. The valuation summary is set forth in Exhibit 9 and revised in Exhibit 11 to give effect to payments made by customers toward service line installation cost. After giving effect to this adjustment, Mr. Palmer's valuation can be summarized as follows:

	<u>Replacement Cost</u>	<u>Depreciated Value</u>
<u>AREA I</u>		
Mains	\$80,033.31	\$67,086.26
Services	69,880.38	31,574.00
Meters and Meter Settings	50,976.24	40,270.34
Regulator Station	14,549.39	10,442.18
Stock Inventory	3,000.00	3,000.00
Dodge Half Ton	3,300.00	631.00
Cathodic Protection	1,500.00	1,000.00
Engineering and Administration	-	18,480.45
Contingency	-	8,624.21
		\$181,108.44
<u>AREA II</u>		
Mains	\$3,976.60	\$3,264.72
Services	6,427.31	5,152.95
Meters & Meter Settings	2,647.39	2,165.80
Engineering and Administration		1,270.02
Contingency		592.67
		\$12,446.16
<u>AREA III</u>		
Mains	\$165,003.51	\$70,126.49
Well Equipment	33,924.06	18,442.73
Services	5,971.22	5,125.91
Meters and Meter Settings	503.36	434.15
Cathodic Protection	1,500.00	1,000.00
Engineering and Administration		11,415.51
Contingency		5,327.24
		\$111,872.03
TOTAL		\$305,426.63

* * * * *

A useful statement showing the differences between the two valuations was agreed to by counsel and was submitted to the Board as part of counsels' argument. Although this statement does not form part of the evidence submitted by the parties the major points of difference in the valuations are clearly demonstrated and it will be useful to include the statement herein as a convenient reference:

NORTHLAND UTILITIES LIMITED

RECONCILIATION OF NORTHLAND UTILITIES AND PALMER
ENGINEERING SUBMISSIONS

RECONSTRUCTION COST NEW LESS LOSS IN VALUE

<u>AREA I & AREA II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Northland Less Palmer</u>
MAINS			
Bare Pipe	\$33,500	\$32,900	\$600
Coating	16,600	7,200	9,400
Construction	73,900	37,200	36,800
Pavement	36,800	4,100	32,700
River Crossing	11,000	-	11,000
Other	2,700	2,600	100
	\$174,500	\$84,000	\$90,500
SERVICE LINES			
Bare Pipe & Coating	14,600	14,700	(100)
Construction	38,000	38,700	(700)
Pavement	11,500	-	11,500
Sidewalk Crossings	1,900	-	1,900
Other	17,700	23,000	(5,300)
	\$83,700	\$76,400	\$7,300
Service Line Adjustment	-	(20,000)	20,000
	\$83,700	\$56,400	\$27,300
METER & SETS			
Meters	40,400	34,600	5,800
Regulators	8,200	8,200	-
Construction	16,100	6,300	9,800
Other	4,700	4,600	100
	69,400	53,700	15,700
Regulator Station	8,800	11,200	(2,400)
Cathodic Protection	800	1,500	(700)
SUB TOTAL	\$337,200	\$206,800	\$131,800

<u>AREA I & AREA II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Northland Less Palmer</u>
Contingency	\$16,800	\$10,300	\$6,500
	354,000	217,100	136,900
Engineering and Administration	45,900	26,100	19,800
	399,900	243,200	156,700
Loss in Value	24,400	57,900	33,500
SUB TOTAL	\$375,500	\$185,300	\$190,200

OTHER PLANT ITEMS AT
MARKET VALUE

Regulator Station Site	3,200	3,200	-
Easements	1,500	1,500	-
Stock Inventory	3,000	3,000	-
Loose Tools and Equipment	800	-	800
Mechanized Equipment	600	600	-
SUB TOTAL	\$9,100	\$8,300	\$800

OTHER CHARGES

Books and records	6,300	-	6,300
Accounts Receivable	11,700	-	11,700
SUB TOTAL	\$18,000	-	\$18,000

TOTAL AREA I & AREA II	\$402,600	\$193,600	\$209,000
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<u>AREA III</u>	<u>Northland</u>	<u>Palmer</u>	<u>Northland Less Palmer</u>
<u>MAINS</u>			
Pipe	\$97,300	\$67,000	\$30,300
Coating	32,500	17,100	15,400
Construction	99,800	62,700	37,100
Fittings	1,000	1,600	(600)
	230,600	148,400	82,200
<u>SERVICES</u>			
Pipe Inc. Coating	-	1,500	(1,500)
Fittings	300	400	(100)
Construction	-	4,100	(4,100)
	300	6,000	(5,700)
<u>H.P. REG. BOXES</u>			
Fittings	1,100	-	1,100
Construction	2,700	-	2,700
	3,800	-	3,800

<u>AREA III</u>	<u>Northland</u>	<u>Palmer</u>	<u>Northland Less Palmer</u>
METERS			
Meters and Regulators	\$400	\$400	-
Fittings	100	100	-
Construction	200	-	\$200
	700	500	200
Cathodic Protection	700	1,500	(800)
WELLHEAD EQUIPMENT			
Material	24,900	24,900	-
Construction	3,500	7,000	(3,500)
	28,400	31,900	(3,500)
SUB TOTAL	\$264,500	\$188,300	\$76,200
Contingency	12,900	9,400	3,500
	\$277,400	\$197,700	\$79,700
Engineering and Administration	36,100	23,700	12,400
	\$313,500	\$221,400	\$92,100
Loss in Value	16,800	126,800	110,000
SUB TOTAL	\$296,700	\$94,600	\$202,100
OTHER PLANT ITEMS AT MARKET VALUE			
Easements	13,400	16,600	(3,200)
Power Lines	5,900	2,000	3,900
Roads	10,000	-	10,000
SUB TOTAL	\$29,300	\$18,600	\$10,700
OTHER CHARGES			
Books and Records	5,100	-	5,100
Accounts Receivable	300	-	300
SUB TOTAL	\$5,400	-	\$5,400
TOTAL AREA III	\$331,400	\$113,200	\$218,200
TOTAL AREA I AND AREA II	402,600	193,600	209,000
TOTAL AREA III	331,400	113,200	218,200
TOTAL SYSTEM	\$734,000	\$306,800	\$427,200

The summary shows wide differences in value in the various items in the distribution system in areas I and II and the transmission system in area III. In each of the two systems, the Company's valuation exceeds the valuation by the Town by more than 100%. For convenience in considering the difference in value proposed by the parties the order set out in the summary will be followed where possible but some items such as "construction", which appears under various headings in the summary, may be considered in one discussion. Although items which are common to the distribution system and the transmission system may be lumped together for the purposes of discussion, the Board will bear in mind the contentious nature of the Town's right to purchase the transmission system and will follow the form of counsels' summary and arrive at a separate valuation for that system.

MAINS - PIPE AND COATING COSTS

The first item where there is a substantial difference in valuation is the cost of pipe. The values for bare pipe in the distribution mains are comparable, but the difference in valuation of the pipe in the transmission line in Area III amounts to \$30,300. According to Mr. Van Der Linden's testimony, the transmission line was constructed of AP 1 5L Grade A Steel Pipe. The Company's valuation however, was not based on the cost of that kind of pipe as it is no longer available for pipe line purposes and would have to be obtained by a special order. According to Mr. Van Der Linden, the price of a special order of the Grade A steel pipe would be higher than the price of equivalent available pipe for pipe line purposes. For this reason the Company based its valuation on a suppliers' quotation of equivalent A.P.I. Grade B pipe, which has a

slightly higher tensile strength than Grade A pipe.

Mr. Palmer, for the Town, described his approach to the valuation of the system on page 109 of the transcript as follows:

" Since construction of the system in 1959, some materials that were used have become obsolete or are no longer available. In some cases equally good or better materials have since become available. Certain engineering practices in the design of pipelines have also changed. Where I felt that the design of the system or that the original material would have been replaced by better or substantially less costly methods or materials, had such been available, I have used the new materials or methods."

In this approach Mr. Palmer valued the transmission line at the cost of using a thinner walled pipe than is actually used in the system. The transmission line was constructed of 4.5" O.D. by .188" wall thickness. Mr. Palmer said this is a heavier wall thickness than would be needed using current engineering design principles so he substituted the cost of 4.5" O.D. by .125" wall thickness. The same method of valuation was suggested in the application to the Board to fix the value of the gas distribution facilities in the City of Grande Prairie. Following the judgment of the Appellate Division on the appeal of Decision 27014, previously referred to, the Board heard a further application to update the valuation which it had determined earlier in order to provide for additions to or changes in the gas facilities which had occurred from December 31, 1964, the date of the valuation in Decision 27014, to December 31, 1966, the date of the valuation in Decision 28075, dated February 24, 1967 issued by the Board on the second application.

On page 12 of Decision 28075 the Board said:

" Counsel for the City in his argument contends that the concept of reconstruction cost new is based upon the building of a system which will do the job. He suggests that this means that in undertaking such reconstruction the contractor

"would not laboriously go out and slavishly reproduce a system which has obsolete aspects in it.

This argument has particular reference to pipe and to the type of meters used. It has transpired that because of more advanced methods of pipe manufacturing thinner wall pipe may now be used than was the case when the system was first built. In addition, changes in regulations have allowed the installation of less costly meters.

While these facts are no doubt true, nevertheless both the contract between the City and Northland and the provisions of The City Act refer not to alternate apparatus but to the apparatus that is there.

The contract contains these words:

'..... in all matters and things under contract, and in all apparatus and property situated within the Town limits.'

The City Act, Section 410, contains these words:

'.....may purchase the rights of the contractor in all matters and things under the contract and in all apparatus and property used for the purposes thereof.'

This language seems to the Board to be abundantly clear. It refers to the apparatus installed and not to substitute apparatus. The price, therefore, must be on the basis of the existing facilities subject, in making the valuation, to giving effect to the factor of obsolescence which has to be taken into account."

The relevant provisions of the High Prairie contract and The Municipal Government Act quoted earlier are identical to the provisions quoted above in the Grande Prairie application and the Board's remarks on the approach to valuing the pipe which was considered there are applicable to the present application. The difference in the value of the transmission line submitted by the parties results mainly from the employment of different methods of determining value, each of which is urged as the proper method to be used by the Board. The same observation applies equally as well to other items in the facilities where there is a wide disparity in the parties' valuations.

The Company generally follows the replacement cost less depreciation approach using mainly the cost of identical

materials as those actually used in the system, and the Town generally has used the approach adopted by Mr. Palmer as described earlier.

In some instances, for example the transmission line pipe, the Company has departed from the replacement cost method because the present cost of the pipe actually used - which is now not readily available - would put an unreasonably high value on the pipe and so the Company's valuation is based on an available substitute which is the closest approximation to the pipe actually in the ground. This use of substitute materials follows the Board's reasoning in Decision 30087 (supra) and in the Board's view is proper and reasonable as far as it goes; but a valuation based on the cost of substitute material and allowing for depreciation but without considering other relevant factors of value falls short of a proper valuation.

The wide difference in the values proposed for items in instances where the Company has used the present cost of original or approximate material and the Town has used the cost of currently used materials suggests to the Board that there are other factors which should be considered in determining value. In the Board's view a determination of value by either method alone may produce an unrealistic result. Using the Company's method, it may be possible to arrive at a valuation of facilities several years old at a price higher than a new system constructed of modern materials. Regarding the Town's valuation of items which appear to be based solely on improved but less costly materials, the Board's remarks in the Grande Prairie application quoted above are applicable, i.e., the Board must value the materials installed and not substitute materials. The Board however, also said that in valuing the existing facilities, due regard must be given to the factor of obsolescence.

In the Board's view, the factor of obsolescence has not been considered as fully by the parties as the circumstances require. It should be observed that while this factor has been considered by the Board in previous applications, obsolescence has not been as important as it appears to be here.

In the Board's view the proper approach to the valuation of the items under discussion is to commence by a consideration of the present cost of the particular item actually used in the utility system. If, as in the case of the transmission pipe, the actual pipe is not readily available then the cost of the closest available substitute should be used as the Company has done in its valuation. Provision must then be made for depreciation because of the age of the item. Where the items being valued have been replaced by modern less expensive articles or materials in current sound engineering practice, the factor of obsolescence must be considered to some degree. The difference in the present cost of the obsolete item and the cost of the modern item should provide a reasonable guide to establish the degree of obsolescence which the Board must weigh in its determination of value. The final determination of value must, of course, vary according to the circumstances and in the final analysis will depend largely on judgment giving due weight to all of the factors which affect value.

In considering the degree of obsolescence of the transmission line, the Board must not overlook considering the comparative utility between the thin walled pipe used in the Town's valuation and the thicker walled pipe used in the Company's valuation. Dr. Bradford, who was called on behalf of the Company, said that all other things being equal, a pipe of 0.188" wall thickness would have a longer life than a pipe having a wall thickness of 0.125". Mr.

Palmer did not seem to think that wall thickness was an important consideration if the pipe was properly protected with good coating and good cathodic protection. He said that for the last fifteen years or so, it has not been current engineering practice to include a corrosion allowance in the wall thickness of pipe in the kind of service under consideration. In the Board's view, it seems reasonable that a thicker walled pipe would last longer than a thinner walled pipe of the same kind with identical coatings; subject to identical conditions; and having identical protection from corrosion.

* * * * *

The values for the bare pipe in the distribution mains in Areas I and II are comparable and there appears to be no real issue on this item. Pipe costs submitted by the Company include an allowance for mill inspection of the pipe although the Company's witness was unable to say whether the pipe was actually mill inspected when the system was constructed. As the Town does not dispute the amount, the cost of mill inspection will be allowed.

* * * * *

There is a large difference in the valuation of the pipe coatings of both the distribution and the transmission system in the summary.

<u>AREA I & AREA II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Coating Mains	\$16,600	\$7,200	\$9,400
<u>AREA III</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Coating Mains	\$32,500	\$17,100	\$15,400

The reason for the disparity in coating price results from two different types of coating being used by the

valuers for the Town and the Company in their submissions.

Mr. Palmer, at page 111 of the transcript, said:

" Trenton wax and Monoply were used as coating on the transmission line and on parts of the distribution system. This type of coating is not now commonly used in Western Canada and, in fact there is no sales outlet for this material in Western Canada. Therefore, I have substituted the cost of Yellow Jacket coating in preparing my estimate of the cost of the pipelines. A quotation of Yellow Jacket is shown in Appendix B."

The Trenton wax pipe wrapping is known in the trade as "mummy wrap". Mr. Van Der Linden said the Company stopped using mummy wrap in 1965 and the distribution system contains pipe with both mummy wrap and yellow jacket. The difference in cost between the two coatings was discussed by Mr. Van Der Linden when referring to Exhibit 3. At page 173 of the transcript he said:

"Q. Could you tell me which two figures are comparable, one showing yellow jacket and one showing mummy wrap?

MR. VAN DER LINDEN: We'll use the example of the two-inch threaded, the figure that applies to the mummy wrap material would be the two dollar, 2.1016 dollars; this would represent the mummy wrap, the figure representing the yellow jacket would be 1.9945.

Q. And about how much of that figure is coating of the 2.1016, is attributable to the coating for the material and for putting on the coating?

MR. VAN DER LINDEN: As listed up above its .3019 dollars.

Q. And the equivalent figure with yellow jacket?

MR. VAN DER LINDEN: .1948 as shown on the table.

Q. So the difference is something like nineteen thirty, is that correct, the ratio?

MR. VAN DER LINDEN: Rounded, yes."

In the Board's view, the use of the Trenton wax type of pipe coating has been largely replaced by the yellow jacket coating and although Trenton wax and Monoply is still available on the market it must be considered

obsolete with respect to the coating requirements of the pipe in the High Prairie system.

The Board has previously pointed out that the factor of obsolescence must be considered in any valuation and such factor must be considered by the Board in establishing the value of the pipe coating used in the High Prairie system.

CONSTRUCTION - PAVEMENT, RIVER
AND SIDEWALK CROSSING COSTS

The cost of construction; the cost of pavement and sidewalk; and the cost of river crossings are other items where there are large differences in the valuations of each party. The differences are shown in the reconciliation as follows:

<u>AREAS I & II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
<u>Mains</u>			
Construction	\$73,900	\$37,200	\$36,800
Pavement	36,800	4,100	32,700
River Crossing	11,000	-	11,000
<u>SERVICE LINES</u>			
Construction	38,000	38,700	(700)
Pavement	11,500	-	11,500
Sidewalk Crossings	1,900	-	1,900
Other	17,700	23,000	(5,300)
<u>AREA III</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
<u>Mains</u>			
Construction	\$99,800	\$62,700	\$37,100

In the item "construction" there is substantial agreement as to the cost of service line construction, but the difference in the cost of constructing the distribution mains in areas I and II amounts to \$36,800 and for area III \$37,100. The Company's valuation of these items was explained by Mr. Dalby at page 18 of the

transcript:

" The details of construction quantities, drawings of the various plant and photographs were sent to two reputable contractors to obtain a quotation for the installation of the existing system. Separate distribution and transmission bids were requested. The two contractors were Banister Pipelines Ltd., and Square M. Construction Ltd. Both are experienced in northern construction and have done contract work for the company. They are familiar with the construction units used.

Banister Pipelines delivered the lowest total bid for the distribution system and therefore their unit costs were used to determine the reconstruction cost new of this system. Square M's bid for the transmission line was the lowest and similarly their unit costs were used for the transmission system."

Mr. Ford, the Chief Engineer for Banister, said that Banister's bid was prepared in the same manner and by the same personnel who prepare tenders for Banister. He said the bid was prepared on the basis of unfrozen conditions and was considered by Banister as if an actual bid for the work was to be prepared. Banister has had considerable experience in the High Prairie area. Mr. Ford said Banister spent several hours during a period of over a week to prepare the bid and that they would be prepared to build the system for the price stated.

Mr. Wandler, the Manager of the pipeline division for Square M. Construction, was involved in the actual construction of the High Prairie transmission line. Square M. also prepared the bid on the basis of unfrozen conditions and it was considered in the same manner as a bid for an actual contract. Square M. has constructed a transmission and distribution system in Fort McMurray within the last three to four years.

Mr. Palmer, for the Town, said the construction costs he used were based on pipe lines constructed for Forestburg and Slave Lake. Mr. Palmer was the engineer on both projects. He has had experience in building pipe lines

as a contractor as well as acting as engineer on pipe line projects. He relied on his own experience as a contractor rather than on bids from contracting firms in order to determine the cost of constructing the High Prairie system. The line constructed at Forestburg was a transmission line of $3\frac{1}{2}$ inch diameter pipe $9\frac{1}{4}$ miles long constructed during October and November of 1968. The terrain was open prairie with no brush. The Slave Lake pipe line was constructed during December, 1967 and January, 1968 and consisted of $6\frac{1}{2}$ miles of $4\frac{1}{2}$ inch diameter pipe. The project involved a transmission line and distribution system. The terrain was 90% muskeg and covered with brush.

In estimating the cost of the High Prairie transmission line using the cost of the above projects, Mr. Palmer made adjustments to update labour costs and to provide for the difference in labour cost between northern and central Alberta. Adjustments were also made by him for the difference in terrain and for construction during frost conditions compared with frost free conditions.

Mr. Flavin testified as to current labour costs he had gathered in Saskatchewan which he thought are now comparable to labour costs in Alberta. The Board is of the view that this evidence is not particularly helpful for determining 1970 labour costs in High Prairie.

Comparing the construction cost estimates presented by the parties, the Board is inclined to accept the Company's valuation which is based on competitive bids by experienced pipe line construction companies rather than the Town's valuation which is based on the historical cost of pipe line projects in other areas of the province, adjusted for High Prairie in 1970.

* * * * *

Each party takes a different position with respect to the inclusion in the cost of the system of an amount to cover the cost of cutting and replacing pavement and other work involved in installing the distribution mains and service lines.

The Company takes the position that the lines and services should be installed in the streets as they are in the existing system. The Town contends that if the system was reconstructed it would be more practical to locate the distribution mains and service lines in the lanes and alleys.

Valuation estimates indicate that the sum involved in this difference amounts to \$46,100.00 as disclosed in the reconciliation. The details are as follows:

<u>AREA I & AREA II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Mains			
Pavement	\$36,800	\$4,100	\$32,700
Service Lines			
Pavement	11,500		11,500
Sidewalk crossings	1,900		1,900
	<u>\$50,200</u>	<u>\$4,100</u>	<u>\$46,100</u>

The franchise agreement between the parties, Exhibit 2, contains a clause which has reference to the location of pipe lines. It reads:

"5. It is understood and agreed that the said pipelines shall be located in the lanes and alleys rather than in the streets and main thoroughfares of the Town when reasonably practicable and where the cost of so doing will not be excessive."

At page 145 of the transcript Mr. Van Der Linden, in response to questions put to him by counsel for the Town, testified as follows:



"Q. Now, you were, however, there at the time of the original installation I think, were you not?

A. That is correct, yes.

Q. Would it have been reasonably practical to lay the lines in the lanes and alleys at that time?

A. The main reason for installing the mains where they are presently located is because of the length of the lots in the town. In a good portion of the older section of town the lot lengths are in the order of about 198, 200 feet long. The original franchise or the franchise that, in Paragraph 12, as previously referenced, indicates that for the first two years the first 75 feet would be installed free, from the property line. Now if the mains had been installed in the lanes, then most of the customers would have had a surcharge on top, and as a result the decision was made at that time to install the mains in the streets.

Q. But the surcharge wouldn't have affected the company?

A. I'm sorry, would you repeat that please?

Q. The surcharge wouldn't have affected the companies in question?

A. No but in fact the decision was made to reduce the cost to all concerned."

This testimony was followed by reference to discussions which took place between officials of the Town and the Company which led to the parties agreeing to have the installation made in the streets rather than in the lanes as provided for in the franchise agreement. This evidence is for the most part of a hearsay nature having been obtained by Mr. Van Der Linden from an examination of historical files.

Following this discussion between counsel and the witness, counsel for the Town asked Mr. Van Der Linden whether it would have made any difference to the Company if the installation had been made in the lanes and alleys rather than the streets, to which he replied:



- "A. It would have made a difference in that we would have had to submit bills to our customers and the customers would have been a little bit unhappy about that, considering the houses were built closer to the front of the lot as opposed to the back.
- Q. So that's, the problem is the customers and the relation with the customers?
- A. That is the effect that it would have on the company, yes, if we installed the mains in the lane.
- Q. And would the cost have been excessive, of laying the lines in the lanes and alleys?
- A. I would suggest that it would be no different than the cost of laying the mains in the streets at that time."

Mr. Palmer, in his testimony, expressed the opinion that at the time the system was completed it would have been practical to have a number of lines placed in the lanes and alleys rather than in the streets. His testimony at page 111 of the transcript is:

- "A. Since the system was originally installed virtually all the streets in High Prairie have been paved. To replace the system today would involve crossing these paved streets 38 times. Therefore, I have included the cost of crossing paved street in my evaluation.
- Q. On that point, Mr. Palmer considering High Prairie as it was at the time, would it have been reasonably practicable to lay out the system using lanes and alleys rather than streets and lanes in the way that you are suggesting?
- A. Yes, I think there is a number of lines that are in the streets, that could equally well have been placed in the lanes.
- Q. And would the cost of doing so been excessive?
- A. I don't think the cost would have been any different."

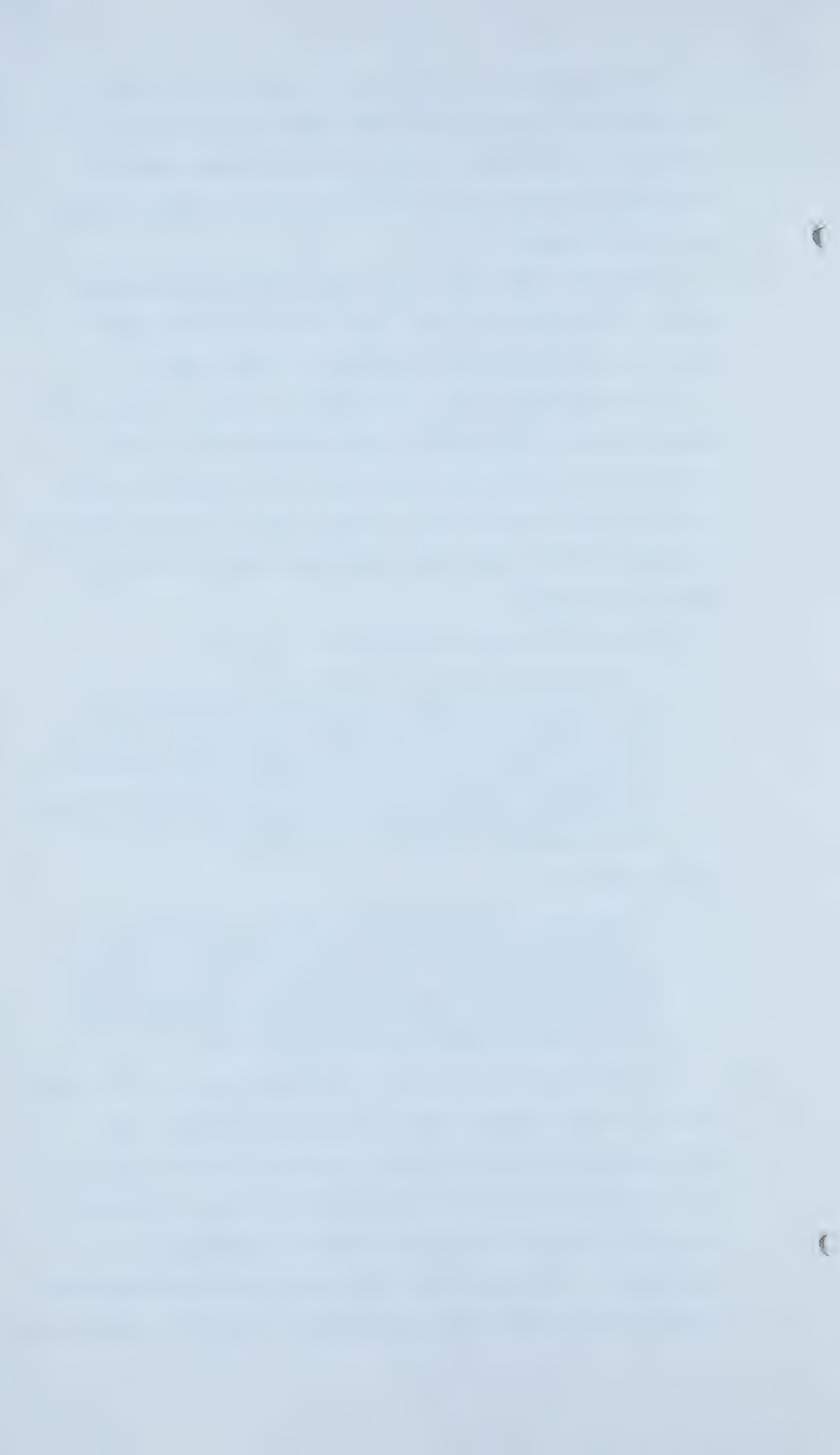
During cross-examination by counsel for the Company Mr. Palmer submitted a plan which he had prepared re-locating some of the lines in the lanes instead of the streets. This plan was entered as Exhibit 19.

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cases that the cost of reconstruction was to be determined according to the location of the existing pipe line that possible alternate locations are to be disregarded.

In the Camrose case, to which the Company refers, the Board said that reproduction cost involved the assumption that what had to be valued was the cost of replacing the existing system with a system that would be identical in size, quality and performance. The Board did not however, say that what had to be valued was an exact replica of the existing system, identical in every respect, including location.

The Board is of the view that the passages quoted earlier from the Camrose decision do not establish a rule that the cost of cutting and replacing pavement is always necessary. The broad approach to the valuation of material costs, on which the Board has already commented, applies in a similar manner to the valuation of construction costs.

Circumstances differ from case to case and the Board must give due consideration to the facts in each case in order to arrive at a valuation that is fair and in reasonable accord with the particular conditions.

In the present application refusing to consider the cost of laying mains in lanes and alleys and other alternate locations is to ignore the realities of the situation in High Prairie. The Company admits that a 4" line was recently constructed to supply a sawmill and that the installation was located on the boulevard wherever possible and pavement crossings were handled by tunnelling under the pavement, thus avoiding the cost of cutting and replacing such pavement.

Mr. Palmer's testimony that the distribution mains

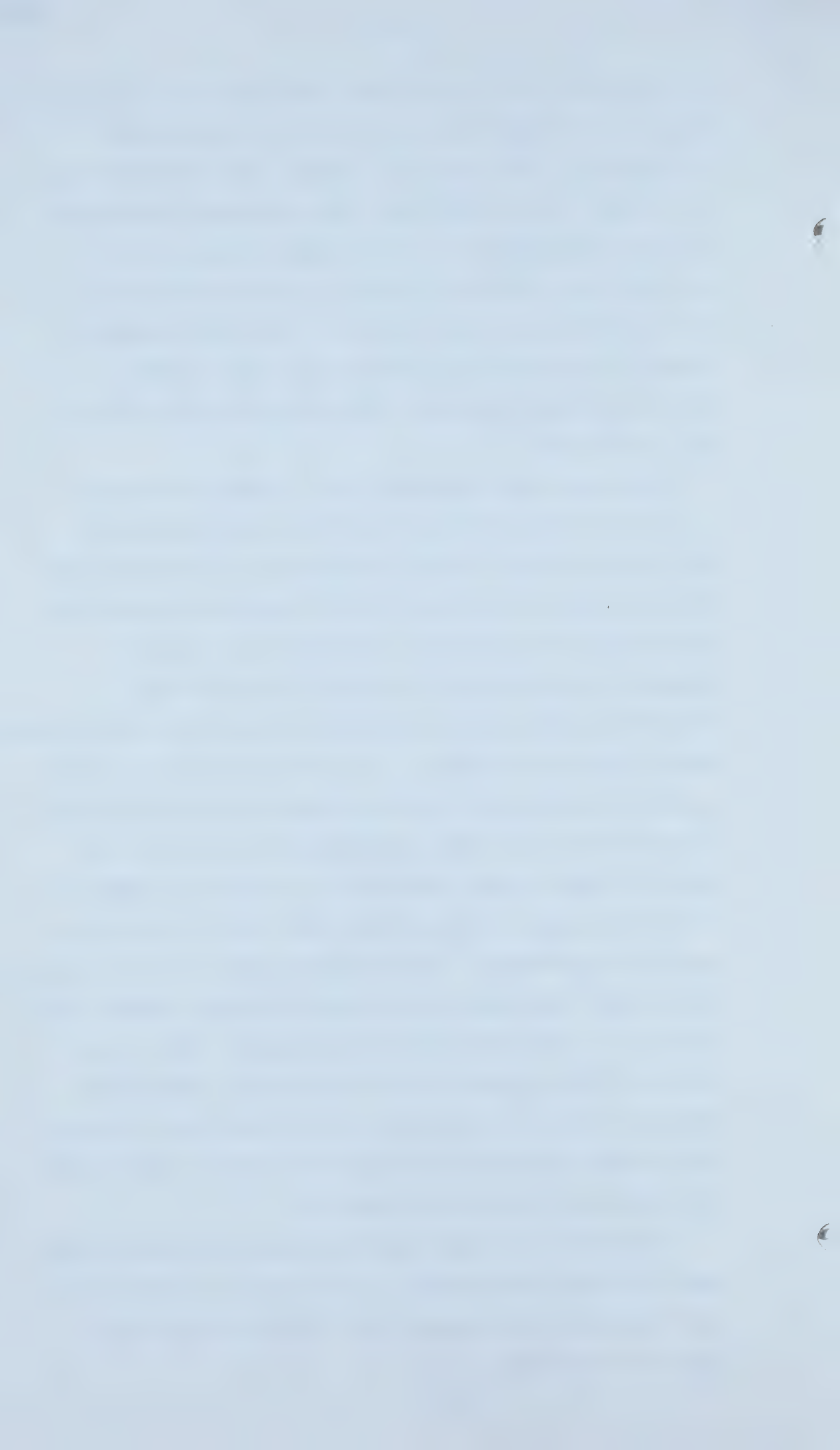


could be installed in the lanes and alleys at a savings compared to street installation was not rebutted by the Company. The Board is, however, not satisfied that Mr. Palmer, in his valuation, has adequately considered all the circumstances. For example he has made no provision for the extra length of service lines that a lane installation would require. The extra footage of service line installation would naturally involve additional hand labour and the evidence on this item is not satisfactory.

The Board finds therefore, that there are items of a counter balancing nature involved in arriving at a fair level of cost for the installation of the mains and service lines as it relates to the location thereof and accordingly the Board must, of necessity, exercise judgment in determining the amount for this item. Furthermore there appears nothing to impede the installation of the pipes in the lanes. In the reconstruction of the system to replace that which is presently in existence it is only reasonable that consideration be given to the effect of placing the pipes in this location as opposed to placing pipes in the streets which would involve the cutting of pavement. On the other hand it is also necessary to consider the added cost of the additional service line length if a lane installation is adopted. This is so because if the system is to be valued on a replacement basis the service lines must also be considered as having to be rebuilt to replace the shorter service lines which the customers have already paid for.

The Board is of the view that these are factors which must be taken into account in arriving at a proper value and the Board will consider such factors in the value which it determines.

* * * * *

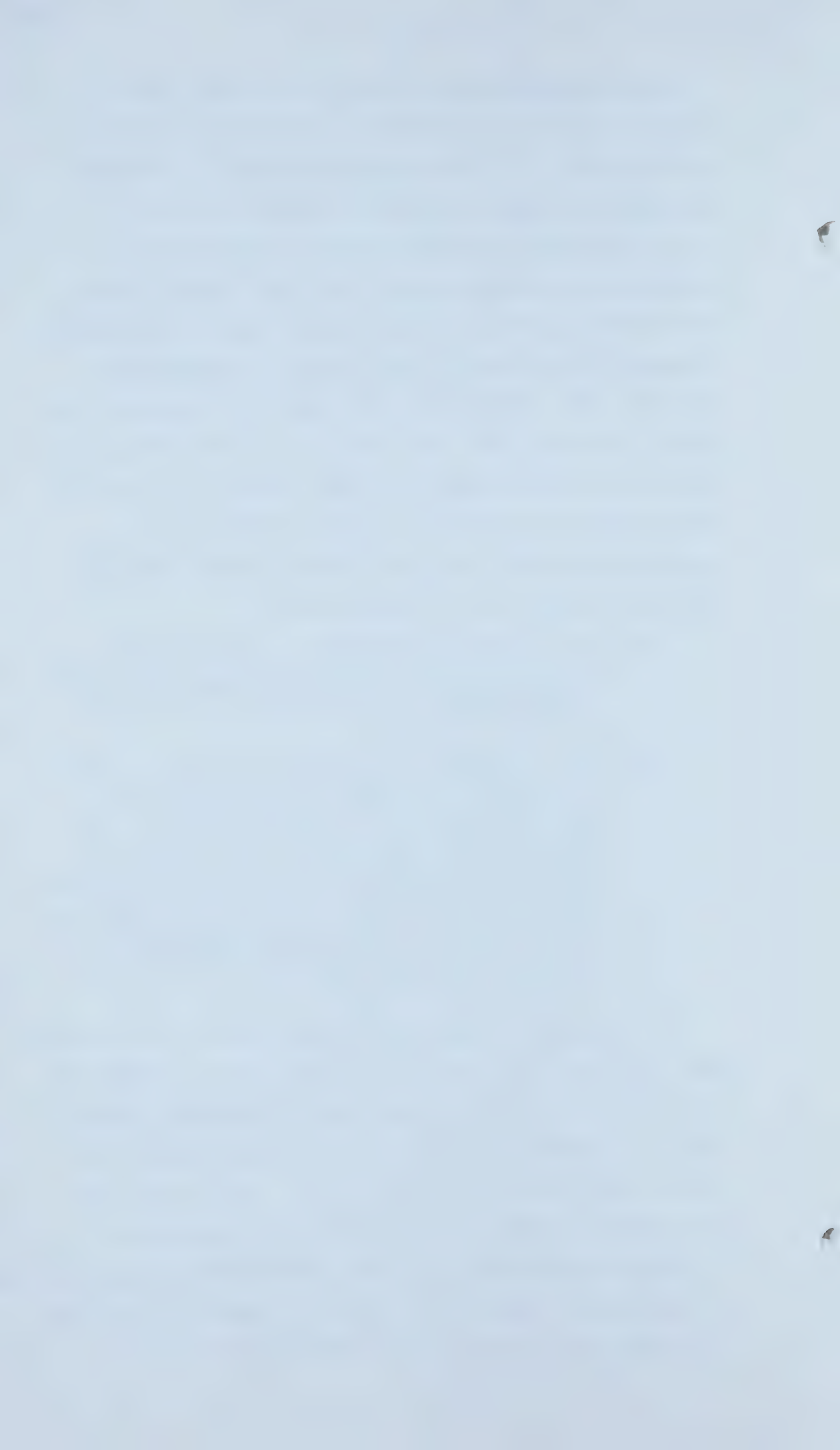


Special construction costs for river crossings is in issue only with respect to the distribution system in areas I and II. The Company provides for two river crossings at a cost of \$5,500.00 for each crossing. Mr. Palmer made no special provision in the Town's valuation for such crossings. Mr. Ford, Chief Engineer for Banister Pipelines, whose bid was used in the Company's valuation of the distribution system, said Banister's personnel were familiar with the river and the water flow and the nature of the river bottom and other matters were considered in determining the cost. Some of the reasons for the additional cost for river crossings in the distribution system were given by Mr. Wandler during his testimony on page 396 of the transcript:

"Q. And I wanted to ask you, is there anything different in the job of crossing a small river on a transmission line with crossing it with a distribution line in a town, as far as the costs are concerned?

A. On a transmission line generally you have got a lot bigger equipment than you have in a town whereas the river crossing like the one that was mentioned in that transmission line does not affect you as much as it does in a town for the simple reason you are working on distribution system, you are working with this small equipment, rubber tire equipment and what have you and to go in and do anything like a river crossing, you have to have bigger equipment to do so which makes it sort of a different item on that."

Upon considering the evidence, the Board is of the view that additional costs are involved for river crossings in the distribution system which cannot be adequately dealt with in a general footage cost which was the method Mr. Palmer used to provide for this item. Counsel for the Town points out the fact that there is a significant difference between the allowances provided for river crossings by Banister and Square M. Banister, whose bid was lower than Square M's for the overall construction of the



distribution system, allowed \$11,000.00 and Square M. estimated river crossing cost at \$3,460.00.

The difference between the two estimates is substantial but there is doubt in the Board's mind, from the evidence of Mr. Wandler, that Square M. considered all factors that would have to be taken into account in constructing the crossings within the Town. Banister's estimate of cost for constructing the distribution system was lower, according to the evidence, than the bid submitted by Square M. and the Company, in its valuation, has relied on the Banister bid for the prices which it used in the distribution system valuation. Mr. Ford testified that Banister's personnel were familiar with the river and with other factors which would have to be taken into account in arriving at the cost of the river crossings and the Board is satisfied that Banister's estimate of \$11,000.00 is the one that appears the more reliable. The Board will use such estimate in the valuation which it finally determines.

* * * * *

OTHER COSTS AND SERVICE LINE ADJUSTMENTS

There is no substantial difference between the parties for "other" costs for "Mains" in area I and II but for "other" cost for "Service Lines" the Town's estimate is \$5,300.00 more than the Company's.

An examination of the transcript of evidence and the written arguments does not reveal what was included in "other" service line costs or the reason for the difference in estimates. The Board's staff auditors were asked to analyze the parties' service line valuations and report to the Board. The auditors' report shows that the amount of \$5,300.00 is mainly composed of cost differentials of various

pipe fittings and in some cases the price difference for the same article is so great that the Board should have been provided with explanatory evidence by the parties. Included in the amount of \$5,300.00 is about \$2,000.00 for quantities of two different sizes of fittings for which the Company's estimate shows blank entries in the unit cost prices. Another \$1,900.00 is accounted for by the difference in the unit cost of two other fittings which the Town's valuation shows the unit cost at nearly twice the price of the quotation in the Company's valuation. One item, of which there is a small quantity, is quoted at a unit cost of more than 500% higher by the Town than by the Company.

Another major item in "other" service line costs is the estimate for pipe coating. The Town's valuation contains an entry for the cost of coating pipe joints and service tees. The Company's valuation does not contain a similar entry but there is an item for tape apparently used in conjunction with tees. The Board does not know if these items are comparable but the cost difference, which is substantial, together with the other items referred to and figures being rounded, corresponds to the \$5,300.00 difference for "other" service line costs. There being no reasons presented to support the higher estimate, the difference in "other" costs for service lines will not be taken into account by the Board. Similarly in area III the additional amount of \$5,700.00 under the heading "Services" as shown by Mr. Palmer in his valuation will not be used by the Board in its determination of the value of the plant contained in that area.

* * * * *



Under the heading "Service Lines" the Town has deducted the amount of \$20,000.00 for "Service Line Adjustment". The Company has not made such an adjustment. This deduction refers to the amounts paid by customers during the term of the franchise agreement for the portion of the service lines which extend from the customers' property line to the residence. These payments were made by customers pursuant to Section 12 of the franchise agreement.

"12. The Company shall during the term of the said franchise supply as much gas as may be required by the said Town when the places or buildings to be supplied therewith are situated on land lying along the line of any low pressure distribution line of the Company. The property line shall be the place of delivery of all natural gas supplied to customers within the Town, but the Company shall also install the pipeline from the property line to a meter suitably located in the customers' premises, the said pipeline from the property line to the meter being installed at the customer's expense. Notwithstanding the above, the Company agrees that during the first 24 months of operation the Company shall install the said pipelines from the property line to the meter at the Company's expense to a maximum of seventy-five (75) feet, the balance to be paid for by the customer....."

Mr. Palmer based his allowance for customer contributions on the information supplied by the Company. It is clear, however, from the testimony of Company witnesses, that in the total footage of service lines used by the Company, and substantially agreed with by Mr. Palmer in both valuations, the amount of service line paid for by customers was excluded from the footage study of service lines in the distribution system. At page 187 of the transcript, Mr. Van Der Linden said:

"Q. No, but their price, you say that the contractor on the one hand put in services from the main to the house, you say to the contractor on the other hand, put in these services from the main to the property line. Are you not going to get a different price per foot from the contractor and did you not in fact get a different price from the contractor?

MR. VAN DER LINDEN: Yes, but the thing is here that the contractor would not install the entire service and then bill us for the portion to the main, or to the property line, and then bill the

" customer for a portion beyond that. He would in fact install the entire line and it would be up to us to bill the customer for the balance.

Q. And so what you have done, or tell me whether this is what you have done, you have taken the view here that the customer paid for the service line, or would pay for the service line from the property line and that the company would pay up to the property line, is that the view that this is based on?

MR. VAN DER LINDEN: Yes, with the exception of the rising detail on the house itself.

Q. And Mr. Palmer's report is based on your reconstructing the whole service line and then applying a customer contribution towards the cost; is that a fair statement or not?

MR. VAN DER LINDEN: Yes I believe that's what he's done. He could probably answer that question better than I. But I would suggest that, in fact I disagree with this particular method of calculating what the end result was."

and at page 189

"MR. VAN DER LINDEN: Our calculation here was in fact based on what the company truly owns in the sense of footage installed in the ground. Mr. Palmer's was based on the total footage with an adjustment for the fact that some of the footages are not owned by the company, and I feel that our method of calculating it is correct."

Mr. Van Der Linden was recalled later in the hearing to explain the detailed calculations in the Company's valuation in regard to service lines and customer contributions.

At page 260 of the transcript he said:

"Q. So that first of all, in order to cover the situation where the customer paid for the service line, you had to make a calculation as shown on page 6 to indicate the cost from the property line to the main, is that so?

A. That's right."

and at page 261

Q. In a case where the customer has paid for and owns the service line on his property, my understanding is that you have not included that service line in the footage in the study?

A. That is correct.

Q. But you have included in such a case in the study, the cost from the property line to the main and the connection to the main?

"A. That is right."

From the above testimony the Board concludes that there is no proper basis for making any deduction in respect of the customer owned portions of the service lines.

* * * * *

There is another item of customer contributions with regard to main extensions which amounts to \$15,000.00. This item was not included in either of the valuation reports but was raised in the supplementary information furnished by Mr. Palmer in Exhibit 11. The purpose of these contributions were discussed by Mr. Dalby at page 190 of the transcript:

"MR. DALBY: I can explain what it is, Mr. Hurlburt, in general principles; I can't speak to the particular contributions that we're referring to here in High Prairie in the amount of \$15,000.00 but at certain times a customer will want a portion of a system extended, and the economics of extending that system are such that the rates will not support the extension, so the customer makes a contribution towards the extension, and it is our, this is the amount of this is in the order of \$15,000.00 but our position is that this has no place in this discussion. We're putting a value on a system, and whether there is a contribution of this type made we feel has no bearing on setting a price on the system."

Counsel for the Company argues that what the Company has received is a payment from the customer in lieu of higher rates, which he would otherwise be charged without the contribution, so that the matter is related to earnings and outside the present proceedings which have reference to the valuation of the assets of which the system is composed.

Counsel for the Town contends that the customer contributions must be deducted and relies on the Board's decision 30087 in the Camrose case. In that decision the Board determined the value of the water supply facilities owned by Calgary Power Ltd. in the City of Camrose in an



application similar to the present proceeding. The question of customer contributions, however, was not finally decided until later, when the parties adduced further evidence and the matter was fully argued. At the time Decision 30087 was issued the evidence of customer contributions before the Board consisted of a supplementary report which had not been tendered at the hearing and on which there had been no opportunity for cross-examination. While the Board decided that customer contributions should be deducted from the amount determined to be paid if the City of Camrose decided to purchase the facilities, the final determination of the question was left open for the admission of further evidence and counsel's argument in a later application. Following Decision 30087 the City of Camrose applied to the Board to have the question of the treatment of customer contributions resolved which resulted in the Board issuing Decision 30283.

Written arguments in the present proceeding were filed before the Board had rendered Decision 30283, so that counsel have not had the opportunity to consider this decision during the preparation of their arguments.

In this application the only evidence which has been submitted for the Board's consideration is the amount of the contributions made by customers for main extensions. The Company has not outlined the arrangements which it has with its customers in this regard nor is there any provision in the franchise agreement which relates to this matter. In the circumstances the Board has come to the conclusion, as it did in the first application in the Camrose case, that the question of whether or not any amount is deductible from the value of the system for contributions made by customers can be determined at the time the Town, if it decides to exercise its right to acquire the system,

applies to the Board for approval of such acquisition.

METERS

In area III the valuations for the cost of meters, regulators, fittings and construction are comparable, but there is a substantial difference in the cost of meters and construction costs in area I and II as shown in the reconciliation:

AREA I AND AREA II

<u>Meters and Sets</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Meters	\$40,400	\$34,600	\$5,800
Regulators	8,200	8,200	-
Construction	16,100	6,300	9,800
Other	4,700	4,600	100
	<u>\$69,400</u>	<u>\$53,700</u>	<u>\$15,700</u>

The difference in meter cost stems mainly from the variation in the parties' approach to the valuation of meters. The Company's method of valuation was described by Mr. Van Der Linden at page 38 of the transcript:

"MR. VAN DER LINDEN: In connection with domestic meters, we have departed from our general principle of costing the items actually in use. The domestic meters actually in use are about 50 per cent iron cased and 50 per cent aluminum cased. The aluminum cased meters are the more modern type.

When coming to obtain quotations on the older type iron meters, we found the price quoted to be unreasonable due to the fact that there is a limited production with a consequent high price. Accordingly, we did not feel we could obtain a realistic price for the iron meters. We did obtain a price but we considered it to be unreasonable.

Consequently we used the price of the lower aluminum cased meter for the iron cased meter in this case. the two meter sizes that we used the same price on were the iron cased 5 B meter and the aluminum cased AL 225 meter.

However, with regard to the remaining larger meters we used the prices quoted by suppliers on the iron meters where such were installed.



" In the Town's costing, the lower aluminum cased price has produced -- has been used for all meters regardless of what was actually installed."

He later explained in detail what he had said earlier about using the cost of aluminum meters. Beginning at page 169 of the transcript he said:

"Q. I'm sorry. You thought that you have used the price of aluminum meters and not the price of cast iron meters for domestic use?

MR. VAN DER LINDEN: That's right, yes.

Q. And I also think that you said that you had concluded that it would be unreasonable to use cast iron meters, or to use the price of cast iron meters?

MR. VAN DER LINDEN: Yes. We did obtain a price on the iron case meter and this is shown in the quotations for material under the heading Canadian Meter Companies Quotation, and the price given was considerably higher than the sixty-seven odd dollar item as compared to the thirty dollar item shown for the aluminum case meter. As a result of that we appreciate that these meters are not now used, and therefore the price indicated to us was not a fair price for that size of meter

Q. And what was the corresponding discrepancy in the case of a larger meter where you used the price of cast iron meters?

MR. VAN DER LINDEN: In the larger meters the meter is still there, it is an iron case meter, the meter price was available from him and we felt that the price would not represent an undue increase in price compared to the type of increase in price that the 5 B meter had been shown.

Q. What is the dollar difference between the two items on one of the larger size, for example, can you give us

MR. VAN DER LINDEN: I haven't recomputed it, no, because we do not use aluminum case meters in place of the larger meters.

Q. Do you have the quotes for oh, I see, you did not obtain quotes for the aluminum case meters of larger size?

MR. VAN DER LINDEN: We obtained quotations for aluminum case meters that in fact were in use in the Town of High Prairie on the system, and these are included in the Exhibit submitted."

Mr. Palmer explained his approach at page 109 of the transcript:

" Since construction of the system in 1959, some materials that were used have become obsolete or are no longer available. In some cases equally good or better materials have since become available. Certain engineering practices in the design of pipelines have also changed. Where I felt that the design of the system or that the original materials would have been replaced by better or substantially less costly methods or materials, had such been available, I have used the new materials or methods. There are several main items that were affected by this:

1. A number of iron case meters are installed in the existing system. This type of meter is not now in general use in Canada, and is no longer manufactured in Canada.

Q. When you say it is not now in general use, there probably are still quite a few of them around, Mr. Palmer?

A. Yes, this is, I would elaborate on that and say that they are not generally used in new installations or purchased now, but there is a lot of them in service, there is no doubt about that.

Q. And would you go on.

A. Current costs of these meters therefore include extra freight and duty charges. For this reason I have used the price of equivalent aluminum case meters in evaluating the system."

He explains the details of the difference between the valuation prepared by the Company and the valuation prepared by him for the Town at page 352 of the transcript as follows:

"Q. Yes, I'll come to that in detail about the power line. Now, with respect to the meters, you appreciate that the company, in its study, Exhibit 3, has valued the old domestic iron meters on the basis of the present price of an aluminum meter?

A. Certain of the iron meters, the 5 B specifically.

Q. Yes, the 5 B's, so that, as far as the 5 B's are concerned, are they the meters used in domestic services, generally?

A. Yes.

Q. There is no difference, the company have valued them out at \$27.00, which is the price of an AL 225?

"



- "A. They are the same price as I used. I used the price supplied by the company.
- Q. So that, the difference between you and the company, on meters, I roughly calculated at about 27 meters, which would be the larger ones?
- A. No, I don't I mean, I may
- Q. Well, generally, on the balance of the meters ..
- A. It was the balance of the meters.
- Q. ... the company have valued them as iron meters, and you have valued them as aluminum meters?
- A. Equivalent aluminum meters.
- Q. Although, actually, the meters in service are the iron meters, is that correct?
- A. That's what I understand.
- Q. Did you try to obtain any quotes?
- A. Yes.
- Q. On the larger iron meters?
- A. Yes, on the 20 B, for example, this is what I got for the price, price not available, use price for AL 800
- Q. You mean you got that from the company?
- A. I got that from Canadian Meter. I got a similar answer on the 10 B meters, price not available, use price for AL 425.
- Q. Yeah, well, I think you'll find the company used the AL 425 there?
- A. They used the price for the AL 425, but they didn't say that that's the equivalent meter.
- Q. Well, they used it in place of the 10 B price?
- A. They used the price, but its not the equivalent meter. The equivalent to a 10 B is an AL 225, so, I used the AL 225.
- Q. Well what I am trying to ask you, take the 60 B meter, did you endeavor to get a quote for that?
- A. Yes, I have a quote for the 60 B.
- Q. Did you use it?
- A. No, I believe I used the equivalent AL 1000, which is a little larger capacity.
- Q. And a lower price?
- A. And a lower price.

"Q. Did you obtain any quote on an 80 B?

A. Yes, I have a quote on the 80 B, but I used the price of an AL 1400, which, again, is a little higher capacity.

Q. And a lower price?

A. And a lower price.

Q.. So, so you could have got quotations, or you did get quotations, on the iron meters?

A. But the manufacturer told me these meters were no longer made in Canada, and that the price would be inflated by added freight and duty charges.

Q. They could, they are manufactured, they could be purchased?

A. They are manufactured somewhere.

Q. Do you know what the extra freight and duty would be? Did you get a figure on it?

A. I could quote the supplier, he said it was a lot.

Q. You don't have a figure on it?

A. He said .. no, I've got a quotation on the meter, and I can see from the price of a 60 B meter, which, I think is ..

Q. It's \$459.00.

A. \$459.00, and the equivalent, AL 1000 --

Q. I'm not interested in that, I'm interested in whether you got a figure on the freight and duty, and I take it the answer is no.

A. The answer is no. I presume the difference between that and the equivalent meter was due to freight and duty.

Q. Was the price f.o.b. some place?

A. The price was f.o.b. Milton, Ontario, with a sales tax added, and the weight and price per hundred weight for freight to Edmonton so that, I was able to calculate the f.o.b. Edmonton price.

Q. Which is the \$459.00?

A. No, the \$459.00 is the f.o.b. Milton, Ontario price, \$528.64 was the price I calculated for the f.o.b. Edmonton price in this quotation here."

In the Board's view, the problem involved in arriving at an evaluation of the meters in the High Prairie system are

the same as those referred to earlier in this decision with respect to the transmission line. As in the case of the transmission pipe, the difference in values submitted by the parties for the meters results from different approaches to value and counsels' arguments on meter values is substantially the same as that advanced for valuing the transmission line. Similarly, the Company has used the replacement cost of the kind of meters actually in use and the Town bases its valuation on modern, cheaper meters that are used in new installations. It is obvious from the above testimony, and from an admission by the Company during the hearing that the Company stopped purchasing cast iron meters around 1961 - 1962 in favour of aluminum case meters, that a factor of obsolescence must be considered. An evaluation of the cast iron meters used in the system based on the present cost of new identical meters without regard to the cost of equivalent aluminum cased meters would produce an unrealistic value as it would in the evaluation of the transmission pipe. The Company recognized this principle when it did not use the price quoted for cast iron domestic meters but used the lower price of aluminum cased meters instead. If the Company had used the same approach for the larger cast iron meters the factor of obsolescence would have been provided for. It follows that it is no answer to say, as the Company suggests, that the difference in price between a new cast iron meter of the larger type and an equivalent or closely equivalent aluminum cased meter is not unduly great so that the lower cost of the substitute modern meter can be ignored for the purpose of evaluation. The difference in price, as the Board mentioned earlier, affords a reasonable guide to the degree of obsolescence which must be weighed in the

determination of value.

There is a further problem in evaluating meters which has to do with the calculation of loss in value. Unlike other parts of the system, meters are exchanged and replaced every six years for recalibration and overhaul. For this reason the Company found it difficult to determine the loss in value for meters. In view of this difficulty the Company assumed the age of the meters to be the same age as the service to which they are attached although, as Mr. Van Der Linden testified, records are available to indicate the date the meters were purchased. The Board requested the Company to supply information on the Company's experience with the service lives of meters and, in response to this request, the Company filed a supplementary exhibit on the experience of Northwestern Utilities, Limited, an associated company. This will be discussed later in this decision.

* * * * *

The next item is the difference in construction cost for meter installation.

Mr. Palmer's estimate of \$6,300.00 is based on his testimony that the price of installing each meter setting would be \$10.00. The Company's cost of \$16,100.00 is derived from quotations received from the same construction companies who quoted on general construction costs and the lower of the two bids was used. The cost of installing the meter sets varied according to size and seems more reasonable than the flat rate suggested by Mr. Palmer, who did not obtain independent quotations.

REGULATOR STATION, CATHODIC PROTECTION
AND WELLHEAD EQUIPMENT

In areas I and II, the estimates for the cost of the

regulator station and cathodic protection are greater in the Town's valuation than in the valuation prepared by the Company. This is also true of the estimate for cathodic protection in area III. In each of these cases the Board will use the lower costs as set out in the Company's valuation.

In area III under the heading "Wellhead Equipment", the material cost is the same but there is a difference of \$3,500.00 in construction cost as the Town's valuation is twice the amount submitted by the Company. The Town's valuation, prepared by Mr. Palmer, sets out construction labour at a cost of \$3,500.00 for each of the facilities without supporting detail and the Company's valuation is based on the detailed bid prepared by Square M. Construction Ltd. This will be accepted by the Board as the valuation for wellhead equipment construction.

CONTINGENCY, ENGINEERING AND
ADMINISTRATION

There is a wide difference in the estimates for these items in all three areas of the High Prairie system:

<u>AREA I AND II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Contingency	\$16,800	\$10,300	\$6,500
Engineering and Administration	45,900	26,100	19,800
TOTAL	\$62,700	\$36,400	\$26,300
<u>AREA III</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Contingency	\$12,900	\$ 9,400	\$ 3,500
Engineering and Administration	36,100	23,700	12,400
TOTAL	\$49,000	\$33,100	\$15,900

The Company's calculations for these costs were explained by Mr. Dalby at pages 19 and 20 of the transcript as follows:

" Sections 4, 5 and 6 are the calculations for the Reconstruction Cost New of the System by area. In these sections, a contingency item of 5 per cent is added to cover costs resulting from: delays in shipment of material, inclement weather, unusual construction difficulties, and other miscellaneous costs not foreseen prior to construction. This is the usual amount added in such estimates.

A surcharge of 13 per cent, made as follows:

Engineering and supervision during construction -	7.5%
Interest during construction	2.5%
Administration during construction	3.0%

was then added to the material and labour costs to give the total Reconstruction Cost New.

The 7.5 per cent engineering fee is to cover the cost of original market surveys and feasibility studies, system design, preparation of construction drawings, purchase and expediting of materials; supervision of construction, and the preparation of "as built" drawings. The 3 per cent company overhead charge is to cover such company costs as preliminary canvassing, the vote of the proprietor electors; sign-up of customers, establishment of office staff for customer sign-ups, and to prepare installation forms for contractor arranging financing, legal fees, head office, accounting, insurance and management and the company including local manager being on hand during construction."

At page 193 of the transcript Mr. Dalby discussed the engineering charges in the Company's valuation:

"Q. Mr. Dalby, Mr. Palmer and Mr. Flavin yesterday were discussing engineering charges on these jobs. In this proceeding you have increased the engineering charge from 7 per cent that was adopted in the Grande Prairie case to 7½ per cent. Now Mr. Palmer and Mr. Flavin, as I understood them, stated they didn't believe in charging that much. Would you make any comment on that?

MR. DALBY: Yes there are two considerations here in establishing whether the level of engineering fees for the design and the supervision of the contractor, preliminary engineering and the total engineering job that was to be done on a project such as this. We looked to the reasonableness of the amount set out under the Grande Prairie

"

" hearing, or Grande Prairie decision. I used the schedule of minimum fees of the Association of Professional Engineers and applied this to the Grande Prairie level of job, the size of job. Fees vary depending upon the, the percentage fee there is upon the size of the job, and in taking the, applying these fees to the Grande Prairie situation, we arrived at a percentage fee of 5.08 per cent for that portion of the engineering services associated with the design, and basically the design services and its outlined as percentage of cost of work, design services and general engineering services during construction. And then we applied the same, used the same table as outlined here in the minimum schedule of fees for the High Prairie situation, and if you look at the distribution system alone and applied the schedule, you'd get a 6 per cent engineering fee, and if you applied the transmission system alone you'd get a 6.25 per cent fee, which is about 1 per cent higher than the 5.8 for Grande Prairie. But someone may take the position that these could be two jobs when they go in, and it could be under one engineering company's supervision, and therefore the engineering fees should be totaled and you should apply this. We total the engineering fees for distribution and transmission. Again we applied the schedule of minimum fees and arrived at an engineering fee of 5.41 per cent for the total High Prairie job, which again compares with the 5.08 for Grande Prairie.

In addition to this, you have to take into consideration that the engineer is reimbursed for his expenses that are properly incurred in the performance of his services, and then there is the extension of the engineering job required here in that the engineer is looking at the preliminary engineering work that is being done and also the supervision of the contractor; he's actually standing in the owners' shoes and we feel in the light of the basis percentage difference in the design services and general engineering services that the half per cent is warranted.

There's one other thing, I think, should be mentioned, Mr. Massie, and I believe this is very important in looking at these fees, and its in the introduction of the schedule of minimum fees of the Association of Professional Engineers of Alberta. It reads: 'This schedule of fees is prepared by the Association of Professional Engineers of Alberta and represents what the association believes to be the minimum fees below which competent and responsible consulting service cannot be provided.'

Mr. Palmer's estimates of the same items are described at page 107 of the transcript:

"A. I have allowed a contingency factor of 5 per cent in my evaluation and an administration and overhead factor of 12 per cent. The administration and overhead factor consists of engineering and ..

" supervision 7 per cent, interest during construction of 3 per cent, administration 2 per cent for a total of 12 per cent.

Q. Now, I think your engineering and supervision is one half of one per cent less than that of the company, have you any comment on that?

A. I believe that the figures I have calculated, and I usually in my own consulting business, I don't deal in percentages necessarily, but the total amounts allowed for engineering and administration, are in my estimate, I believe are more than adequate.

Q. How would they relate to the fee that you would charge?

A. They would be more than the fee I would charge.

Q. And what would you normally do about administration?

A. Normally in jobs I have done, I have carried out a lot of the administrative work myself. Of course, the people I work for, have some additional administration.

Q. And I take it that the engineering and administration on the next page on the schedule we have looked at, amounts to 9 per cent, is that right?

A. Yes.

Q. Is this the usual situation with regard to contingencies, Mr. Palmer?

A. Usually when I estimate a job, I include 5 per cent contingencies to take care of such things as changes in design and unforeseen expenses. This system is built and we are actually duplicating a system, we have a list of the exact amount of materials that should go into it. In theory, smaller contingency factor is allowable, but I feel that it is a fair evaluation to include that contingency factor."

Mr. Palmer said in answer to a question from the Board that his allowance for a contingency factor of 5 per cent was the same as the allowance by the Company.

Mr. Flavin said a 5 per cent contingency factor is normal in engineering estimates but he agreed with Mr. Palmer that in this case, where there is a detailed list of the materials used, some consideration should be given to using a lesser amount. As to engineering and administration Mr. Flavin said at page 141 of the transcript:

"A. It is our practise in arriving at engineering fees in projects of this nature to stay pretty well

" with the fee schedule as laid down by the association, and in projects of this nature the engineering in itself is something between 5 and 6 per cent, but in addition to that you do have some field inspection, some X-ray, possibly some mill inspection, and its been my experience in the past few years that our engineering fee is very close to 7 per cent, or engineering charges I should say."

With regard to the contingency factor of 5 per cent, the Board does not consider that the fact that a detailed list of parts and materials was available from the Company's records has any relevance for this purpose. In the Grande Prairie decision (supra), referred to by Mr. Dalby, the Board allowed 12 per cent for the items of contingency, engineering and administration. The Town's estimate is at the same percentage while the Company now proposes 13 per cent. The Board is satisfied that the breakdown of the Company's charges is fair and reasonable and the Board, in this case, accepts the estimate of 13 per cent proposed.

LOSS IN VALUE

The difference in the amount of accumulated loss in value suggested by the parties is one of the major items which contributes to the wide disparity in the totals of the two valuations.

The actual physical condition of the transmission line and the distribution system in High Prairie was examined by two witnesses called by the parties: Dr. Bradford, associate Professor of Metallurgy, University of Alberta, called by the Company and Mr. Seager, an electrical engineer and consultant in corrosion control, called by the Town. Dr. Bradford and Mr. Seager examined the transmission line at two sites and the distribution line at four sites. The steel of the transmission pipe was in perfect condition and no sign of rust was detected. The first site of the distribution line examined, containing 1" and 3/4" pipe, had a small amount of surface rust which was probably

present when the coating was applied as the coating itself was in perfect condition. At the second site, where a 3/4" service line was examined, the pipe was in perfect condition with no sign of rust. The third site was at the northern edge of the town close to the only reported corrosion leak in the system where the pipe had been wrapped by hand rather than machine wrapped. At this site, the wrapping had loosened and become slightly damaged by water. However, the wax coating was perfect and the pipe was free from rust. This site was in an area where there had been no cathodic protection until 1968 but there was no corrosion damage to the pipe during the ten years it had been in the ground before cathodic protection was installed. The last site was on a 4" pipe line in an area of fairly high corrosion. The pipe had only a small amount of surface rust which appeared to have been present when the coating was applied. The coating was perfect and the steel was not pitted. Dr. Bradford said the system was in excellent condition.

He said that the site inspections were suggested by the Company as to number and exact location, but he had specified the kinds of site he wished to examine. He specified an examination of hand wrapped pipe; a high ground transmission line site near the wells; and in low ground, and a fairly uniform distribution of sites around the town. Locations were chosen by the Company to avoid cutting streets.

Mr. Seager agreed with Dr. Bradford's opinion of the sites and said his report, Exhibit 17, dealt with the adequacy of the cathodic protection in the system. Cathodic protection refers to a method of corrosion control whereby electron removal from the metal of a pipe is prevented either by means of a sacrificial anode or by applying an

electric current to the pipe. On page 327 of the transcript, Mr. Seager said: (referring to Exhibit 17)

"A. That is millivolts. 850 millivolts is considered a good criterion for protection. Anything below 850 is less than adequate protection so, I will proceed and read this discussion if you wish;

' The observed pipe soil potentials indicate less than adequate cathodic protection on the gas distribution system (-850 MV is required for protection) this is corroborated by recent pipe soil potential readings taken by Northwestern Utilities' personnel. A review of previous cathodic protection data likewise reveals a history of reduction of protection by inadvertent short circuit connections to the water system. An indication of the level of protection maintained, and shown on the accompanying graph, leads us to the conclusion (with consideration for the elapsed time prior to the application of cathodic protection) that an average of less than 35% protection has been afforded this system. We therefore conclude that, although no active corrosion was discovered in the bell hole survey, the system must certainly have experienced some external corrosion damage. (This conclusion is supported by the past occurrence of a corrosion leak on this system.) As a consequence it would be necessary to upgrade the cathodic protection system (utilizing a rectifier) at a cost of \$1500, in order to achieve full continuing protection and to provide monitoring facilities to minimize losses due to short circuits to the water system. Under such circumstances it is felt the existing sacrificial anodes should be considered to have no real dollar value at present.

No attempt was made to ascertain the internal condition of the system, nor to discover any presently existing leaks."

Mr. Seager's statement that the system had been protected on an average of less than 35% during its life was based on the results of his tests in December 1970; the fact that there was no cathodic protection from 1959 to 1962; and the records of cathodic protection readings made by the Company from 1962 to the present. The results of these readings were appended to Mr. Seager's report in the form of a graph on which the readings are shown in terms of cathodic protection percentages and which shows the average protection at the level just mentioned.

* * * * *

In areas I and II the difference between the amounts suggested by the parties for loss in value for the distribution system is as follows:

<u>AREA I & AREA II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Loss in value	\$24,400	\$57,900	\$33,500

One reason for the lack of agreement on this item is because each party used its own reconstruction cost new total figure and the details of the valuations of the main items have been discussed. But even if the Company and the Town had been able to agree on the total reconstruction cost of the system, there would be no agreement on the amount to be deducted from the reconstruction cost as an allowance for the age of the system because they have used two different approaches to determine loss in value. The only aspect of the two approaches to determining loss in value where there has been agreement is the estimated service life of the various components of the distribution system. Here, the parties used the service lives of the components of the Grande Prairie gas distribution system which was considered by the Board in Decision 27104.

The study on loss in value for all three areas of the High Prairie system was prepared for the Company by Mr. Leslie. A summary of his findings is set out in his report as follows:

SUMMARY - Loss in Value of
The High Prairie Production, Transmission
and Distribution Systems.

<u>Area & Account</u>	<u>Reconstruction Cost New</u>	<u>Loss in Value</u>
<u>AREA I</u>		
Mains	\$192,664	\$6,521
Services	93,795	10,149
Meters & Regulators	77,796	4,602
Regulating Station	10,434	1,716
Cathodic Protection	925	438
	<u>\$375,614</u>	<u>\$23,426</u>

<u>Area & Account</u>	<u>Reconstruction Cost</u> <u>New</u>	<u>Loss in Value</u>
<u>AREA II</u>		
Mains	\$14,343	\$275
Services	5,467	518
Meters & Regulators	4,451	201
	<u>\$24,261</u>	<u>\$994</u>

AREA III

Mains	\$273,537	\$11,324
Services	4,941	276
Meters & Regulators	770	26
Wellhead Equipment	33,412	4,614
Cathodic Protection	868	594
	<u>\$313,528</u>	<u>\$16,834</u>

Mr. Leslie's method of determining loss in value is described in the following excerpts from the transcript of his testimony at page 44:

"MR. MASSIE: Mr. Leslie, what is the basic concept of depreciation as used in the valuation of property?

A. In property evaluation, depreciation is defined as the loss in value not restored by current maintenance due to all the factors which cause the ultimate retirement of the property.

Q. Does this concept of depreciation differ from that normally found in accounting statements?

A. Yes it does, the accounting concept of depreciation is the amortization of cost of facilities over the service life. Many methods are used by accountants to allocate cost over service life and these include the straight line declining balance and sum of the years digits methods.

The accounting approach to depreciation is therefore, one of cost allocation and not of valuation ...

Q. How do you define depreciation in an economic sense?

A. Depreciation is defined as the diminution or loss in value. Since value is defined as the present worth of benefits or services that will be derived from the property in the future, loss in value or depreciation in an economic sense must relate to the reduction of future benefits and can therefore only be assessed by the application of present worth principles.

Q. How do you arrive at the value of utility property?

- "A. The value of utility property is derived from the service which the property will provide between the date of valuation and the date of ultimate retirement of the property; in placing a value on the property an interest discount factor must be applied in order to get the present worth of services which lie in the future.

In the case of new property the installed cost is the present value of the future services which it will provide; similarly the value of property in service is the reproduction cost new of the property adjusted for loss in value as a result of the reduction in future service life.

- Q. In speaking of the value of future services, are you in any way speaking of the dollar earnings of the property?

- A. No. Value is based on the services to be provided by the property in the future.

- Q. When valuing property, are you in effect comparing the existing property with a similar new property?

- A. Yes. The valuation problem is similar to a choice between two assets which provide equal service but which have unequal lives. In such a problem of choice the amount which a prudent investor would pay for the shorter lived asset is established from the longer lived asset using the principles of present worth

- Q. What is the fundamental difference then between the straight line and interest methods of calculating depreciation?

- A. The fundamental difference is the assumption in the straight line method that services rendered today and those rendered at some point in the future are of equal value. This concept was discussed in a publication of the American Society of Civil Engineers in November, 1944, entitled 'Principles of Depreciation' in which the 1943 report of the National Association of Railroad and Utility Commissioners was discussed. Quoting from the American Society of Civil Engineers report, they stated the following:

' The straight line method advocated by Naruc (N - A - R - U - C) Committee, assumes that a unit of service to be rendered today and one to be rendered some day in the future are of equal value, which obviously they are not. The only theoretically correct method of distributing the depreciation of a unit of property over its service life is on the basis of a method by which the time value of money is recognized.'

Reading from his report, Exhibit 6, Mr. Leslie said at page 47 of the transcript:

" The High Prairie property is a small system installed in the last 11 years, for which there are virtually no retirement experience data. In view of the lack of data, and since the valuation of the system did not justify the expense of a detailed life analysis and forecast, it was decided to base the estimate of loss in value on the depreciation rates ordered by the Public Utilities Board in its decision (Decision No. 27014) in the Grande Prairie case. These rates, together with an additional rate for well-head equipment taken from the same source used by the Board in the Grande Prairie decision, were converted into average service lives, as shown below

"as follows in the table shown. And this table lists each account, the depreciation rate in per cent per year, the average service life in years which is derived from the depreciation rate by dividing the rate into one hundred and the source which in the first five cases is Decision No. 27014. The last account shown is taken from the Federal Power Commission Publication entitled 'Depreciation Practices of Natural Gas Companies', F.P.C. S-159.

" In estimating loss in value, it has been assumed that the above average service lives based on the reported depreciation rate of a major proportion of the natural gas industry in the United States, take account of all of the factors which contribute to loss in value and which lead to the ultimate retirement of the property. In using these service lives, the important distinctions between depreciation in its accounting sense and loss in value are recognized....."

In answer to a question on how present worth is determined, Mr. Leslie said at page 51 of the transcript:

" As in any computation of the present worth in dollars of dollar values in the future, the future dollar values are discounted by a factor which takes account of the appropriate interest rate and the number of years involved.

Q. How did you select the interest rate or discount factor to be used in your calculations?

A. The problem of arriving at a suitable interest rate to use in the estimation of loss in value is really that of determining the discount rate which is applicable to determine the present worth of the remaining service life of the property as of the date of valuation in 1970 prices.

The selection of the appropriate interest rate is complicated by inflation which affects both the cost of the property over time and also affects the cost of capital as determined in the financial market. If we lived in a world in which there was no inflation, the selection of an interest rate for use in the estimation of loss in value would be relatively easy; we would use the cost of capital directly but since we live in a situation where there is significant inflation we must correct the cost of capital as determined in the financial markets for the allowance for inflation which it contains and obtain what we

" call the real cost of capital - the cost of capital in dollars of equal value. In this case we have computed the real cost of capital at this time to Northland Utilities Limited at 7 per cent.

Q. Do you have an exhibit showing this?

A. Yes, it is shown following the text in exhibit 6. It's a table entitled, 'Current Cost of Capital.' It shows that the estimate of current cost of capital to Northland Utilities and its subsequent adjustment for inflation. It begins by determining the cost of debt based on the yield of two recent bond issues by Northwestern Utilities and Canadian Western Natural Gas Company Limited.

While we have assumed that the Northland Utilities cost of debt is similar to that of the two companies shown, it is likely that the Northland Utilities cost would in fact be slightly higher due to its smaller size. In the table we relate the yield to the public for the two issues shown to the McLeod, Young Weir index of ten public utilities bond yields at the time of issue and so determine an average ratio of these issue yields to the index. This ratio is then applied to the current value of the index to obtain an estimate of the current cost of debt to Northland Utilities.

In the case of equity, we have used the rate of return on equity for Northland as contained in the recent rate of return decision of the Board regarding Northland Utilities. The costs of these two capital components are then combined in the ratio of 60 per cent debt and 40 per cent equity to give a weighted average cost of capital of 11.69 per cent

The final step in the calculation is the adjustment of this cost for inflation and we have used an inflation rate of 4 per cent based on recent trends in the implicit price index of gross national expenditure. The final interest rate is rounded to 7 per cent for use in the loss in value calculations."

* * * * *

Mr. Palmer described the method of calculating depreciation in his report, Exhibit 9, as follows:

" In calculating the present value of the various assets, I used the following annual depreciation rates:

Mains	2%
Services	3%
Valves & Fittings	2%
Cathodic Protection	10%
Meter Settings	2.5%
Regulator Stations	3.4%
City Gate Station	3.4%
Transmission Line & Wellhead Equipment	5%

" These rates, except for the last one, are consistent with the allowances used by the Public Utilities Board in their Grande Prairie decision. In all cases one half the annual depreciation rate was applied to the asset during the year it was installed.

The transmission and wellhead equipment depreciation rate of 5% is based on the assumption that there was twenty years gas supply in the two wells connected to the pipe line. For this reason I have assumed that the pipe line will have no further value after 1979. I have, however, allowed a salvage value of \$7,000.00 for the two dehydrators in 1979."

Mr. Geddes, called by the Town, when asked about the nature and purpose of depreciation accounting, said at page 89 of the transcript:

" A convenient definition of depreciation accounting and a standard one, is provided in the Canadian Institute of Chartered Accountants publication 'Terminology for Accountants' as follows: ' An accounting procedure in which the cost or other recorded value of a fixed asset less estimated salvage if any, is distributed over its estimated useful life in a systematic and rational manner. It is a process of allocation, not of valuation.' The sense in which the accountants use the term depreciation differs not only from its colloquial sense, but also from the sense in which it is used in engineering, and it is far removed from the root meaning of the word itself, diminution in price or value.

It should be emphasized that the depreciation process in this context seeks only to apportion the cost of an asset as a charge against operations in a systematic and rational manner. There are no absolute criteria of rationality, although there is a body of opinion which holds that any of the various alternative methods of depreciation might be rational, and possibly equally rational in the diminishing light of fore knowledge of future events and probable consequences. I would add that there are three basic methods of providing for depreciation; first the straight line method in which the cost of fixed assets is charged to operations by a series of equal annual payments over the estimated service life of the asset in such a way as to amortize the entire cost of those assets, minus their estimated salvage value. This method has the advantage of simplicity and is widely used in rate making procedures.

Secondly, our diminishing balance methods, of which the sum of the year's digit method is one example. The diminishing balance methods have the result of creating a large charge as an expense in earlier years, diminishing to near zero in the last years of an asset's estimated useful life. Proponents of this method argue that it produces a rational system in that it matches the expected high cost of repairs in later years, with the diminishing annual depreciation charge in such a way as will produce relatively stable annual charges."

" Thirdly there are what are termed interest methods of depreciation, of which the two main applications are the annuity method and the sinking fund method."

When questioned about Mr. Leslie's method he said at page 91 of the transcript:

" I have made test calculations at selected intervals, and these calculations reveal that the condition per cent percentages which are derived by the use, in these tables are derived through the use of what is called the annuity method of calculating depreciation, which, as I have said earlier, is one of the two main applications of interest methods of calculating depreciation, the other being the sinking fund method. In other words, the procedures followed yield a result which is exactly equivalent to that which is derived under a conventional depreciation method, and as stated earlier, conventional depreciation methods do not purport to value assets, but rather to apportion the cost of those assets over their estimate useful life."

Mr. Geddes also said that the annuity method was theoretical in approach as a means of calculating depreciation and in the context of valuation, is even more theoretical and is only one of several approaches to valuation.

In decision 30087 with respect to the Camrose case, the Board discussed at length various methods used by valuers in determining depreciation for valuation purposes. In the Camrose case Mr. Leslie, testifying on behalf of Calgary Power Ltd., used present worth principles in a manner similar to that which he is advocating in this application.

After discussing the evidence presented by the parties in the Camrose case, the Board rejected the present worth method on the grounds that in substance, the method involved considering the present worth of the future earning power of the enterprise. The Board pointed out that this basis had been previously rejected by the Board in the Grande Prairie case and that the position is supported by the judgment of the Judicial Committee in *International Railway Company v Niagara Parks Commission* (supra).

In the present application Mr. Leslie, during the course

of his examination in chief said, when speaking of the value of future services, that this value is determined not on the basis of the dollar earnings of the property, but on the services to be provided in the future. On cross-examination he said that in his view, reproduction cost new represents not only the present cost of future services but also the value of the future services on the basis that cost is the measure of value. He also said that although the value of the system does not involve an assumption of ownership the interest rate he selected to use in the estimate of loss in value was influenced by Northland's cost of capital which would vary from one company to another.

The Board finds it unnecessary to make comparisons between the straight line method of computing depreciation and the present worth method advocated by Mr. Leslie. In the Board's view, for the purposes of determining loss in value in these proceedings, it does not matter whether the present worth method is essentially an annuity method of calculating depreciation as suggested by Mr. Geddes, or whether in essence, it involves future earnings of utility property or theoretical methods of allocating cost as a measure of value. The problem facing the Board in determining loss in value in proceedings of this nature was described by the Board in the Camrose Decision. On page 48 the Board said:

" The Board has pointed out that both valuers have relied on depreciation rates, determined, not for valuation purposes, but for the purposes of amortizing the cost of the property over the estimated service lives thereof. What the Board has to determine in these proceedings is what amount should be deducted from the reproduction cost new of the property to provide diminution in value because of the age of the property, which must include an allowance for such factors as obsolescence and changes in the art of constructing facilities for the pumping, storing and distribution of water in the City, the Board is convinced that this cannot be done with any degree of precision and must of necessity be determined by judgment using, in forming such judgment, all available evidence that has been adduced."

In this application, both valuator's used the service lives of the components of the gas distribution system which was considered in the Grande Prairie application. In the Board's view, the two systems are not comparable for the purposes of valuation. In the Grande Prairie case, cathodic protection was not installed until seven years after the system had been built and there was a high incidence of leaks. In the High Prairie system there have been no leaks in the transmission line and only one leak, a pinhole on a service tee, in the distribution system. Cathodic protection was installed beginning in 1962, three years after the system was built and although the average protection has been only thirty-five per cent of what it would be, full continuing protection could be obtained, according to the evidence, by upgrading the cathodic protection system at a cost of \$1,500.00. The evidence of the corrosion experts is that the High Prairie system is in excellent condition, although physical inspection was made at fewer sites than the Board would have thought satisfactory to support this opinion.

In the Board's view, loss in value due to age depends more upon evidence of the actual physical condition of what is being valued than upon mathematical methods of computation. As the Board said in the Camrose case, loss in value generally depends upon different factors which vary from case to case which usually makes it impossible to compute on a mathematical basis. With regard to loss in value due to age, the Board is satisfied that more weight should be given to evidence of physical condition than mathematical approaches. From the testimony given in these proceedings about corrosion and similar evidence in other cases it seems clear that pipe corrosion depends upon such factors as location and soil and chemical conditions which vary to such a degree that comparisons of gas distribution

facilities of other systems while useful, should be considered with care.

* * * * *

Earlier in this decision, the Board referred to the difficulties involved in determining age and loss in value for meters. In a gas distribution system meters are exchanged and replaced every six years for recalibration and overhaul. For this reason, the Company assumed that the meters were installed as new in the High Prairie system and are of the same age as the service to which they are attached. In fact this may not be true as not all of the meters that are presently in use were installed new, although as the Company says, they were in new condition. Company records show the date of purchase of each individual meter but the records are apparently not designed in a way that would permit the age of each individual meter in the system to be easily ascertained.

At the Board's request, the Company filed a supplementary exhibit dealing with meter service lives based on the experience of Northwestern Utilities, Limited, an associate company. In the Board's view, meters are not subject to the same factors of physical deterioration as are underground facilities in a gas distribution system, hence comparisons with meter service life experienced by other gas distribution systems are of assistance in reaching a valuation.

In the Northwestern Utilities' study of 130,432 domestic meters purchased from 1923 to the present, all but 272 meters are still in service. Of the 272 meters not in service, less than 50% were taken out of service by the company, the remainder having been lost mostly because of fires; of those taken out of service, by far the greatest

number were damaged through causes other than corrosion. The study also shows, that meters numbered 2 to 77, presumably purchased in the early years of the company, are still in service.

From the evidence the Board is unable to come to any conclusion about meter service lives, but it is obvious that meters have unusually long service lives compared to other components in a gas distribution system and this must be considered when determining value. Also, on the grounds that a used meter in new condition, will not have the same value as a new meter, the assumption that the meters in the High Prairie system have the same age as the facilities to which they are attached, is unacceptable. The Board will consider the above points when determining the value of meters.

* * * * *

The Town calculated loss in value of the transmission line on the assumption that the line would no longer be useful after the existing wells failed to supply gas and evidence was presented to show that the wells would last only seven or eight years. The Board finds it unnecessary to review the testimony on this point in detail as it is not satisfied that the area in which the wells are located has been explored sufficiently to discount the possibility of finding additional sources of gas.

* * * * *

One further point must be considered in determining loss in value due to age. Although the High Prairie system was built primarily in 1959 and 1960, additions and extensions have occurred in each subsequent year so that while the system is mainly ten years old, a portion of the facilities have a lesser age and would not be reduced in value to

the same extent.

* * * * *

OTHER PLANT ITEMS AT MARKET VALUE

In areas I and II the only item under this heading in contention is \$800.00 for loose tools and equipment, the Town does not argue against the inclusion of this amount as long as useful items to that value are available and the item will be allowed on that basis.

In area III the difference in the valuations is as follows:

<u>AREA III</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
<u>Other Plant Items at Market Value</u>			
Easements	\$13,400	\$16,600	\$ (3,200)
Power Lines	5,900	2,000	3,900
Roads	10,000	-	10,000
	\$29,300	\$18,600	\$10,700

The lesser value shown for "easements" by the Company will be used for the purposes of this decision.

The difference of \$3,900 for the item "power lines" results from the Town and the Company valuing two different methods of providing heat to the gas wellhead sites to prevent freezing of the flow lines. The Company's valuation is for electric power poles and lines which are installed to provide heat at the wellheads. Mr. Palmer said adequate heat could be provided at a much cheaper cost by installing hot glycol tracer lines. On page 112 of the transcript he said:

" Power lines have been installed to each of the supply wells. I understand that the main reason for this was to provide power for heating cable installed on the flow lines between the wells and the dehydrators. The purpose of the heating cable was to prevent the formation of hydrates in these flow lines. I believe that it would have been much cheaper to have simply installed hot glycol

"tracer lines along these flow lines and between the pipe and insulation. In my estimate I allowed \$2,000 as the value of these power lines. This may be less than the power lines actually cost, but it is substantially more than the hot glycol tracer lines would have cost."

Mr. Palmer described his valuation of the power lines on cross-examination at page 367 of the transcript:

"Q. Now, you say you allowed \$2,000 as the value of these power lines; what are the particulars of your \$2,000 valuation?

A. Well, I felt that the equivalent hot glycol tracer line might cost \$150.00 per well. However, I felt that, to be conservative in my estimate, I would say that I would put a value on having power lines in there, of some kind, because its handy to have a light bulb around. So, I put a value, I thought to myself, I think I would pay a maximum of \$1,000 to get power into a gas well such as this. If it cost any more than that, I wouldn't do it. So thats how I evaluate it."

In the Board's view there is nothing in the evidence to suggest that there is any element of obsolescence in the Company's heating facilities on the wellheads and there is, therefore, no basis for valuing the electric power line in comparison with the cost of an alternate method of supplying heat. The Company's valuation will be accepted for this item.

The item of \$10,000.00 included in the Company's valuation for "Roads" refers to the access road to the wellsites. This was explained by Mr. Van Der Linden at page 159 of the transcript:

" The word market value has been used. The market value of the roads would be the value, in this case, of the road which has been constructed by the company to provide ready access to the wells. The road is built on the government road allowance. Original road was considerably longer. It is maintained, regravelled and graded up and maintained, as I say by our company people. We basically built the road. The road would be required today for that well and it would have to be built, not by the Department of Highways but by the company or whoever was reproducing a system "

and at page 160

".....At the present time the Department of Highways maintains a road to the north border of Section 6 "

" and Section 5. Now they maintain a road to that and it is cultivated now to that point. From that point north the company still has the road graded, gravels the road and maintains it in a suitable condition to be used for access to those wells.

Q. But you can't give us title to that, I take it?

A. If you had to replace this system, which was the basis on which we valued our, made up our value, you would in fact have to install the two miles of road indicated, the Department of Highways would not, and it would be at your cost.

Q. But you still can't sell it to us?

A. You would have to replace this. I think I've explained my position on that."

A map forming part of the Company's valuation, Exhibit 3, shows the transmission line running due north from the town beside a government road allowance. The two gas wells which supply the system are located to the east and west of the road allowance respectively and the combined distance of these two wells from the road allowance is about one half mile. Each well is serviced from the road allowance by an access road. Mr. Palmer said he did not include a value for roads because of the fact that about one and one-half miles of road is on government road allowance and that usually access roads are paid for by the owners of the wells.

It is clear that the Company could not convey title to a government road allowance and there is no evidence that the Company has any right to the one half mile of access road to the wells which could be conveyed. Apparently, the Company has a right to the use of the roads, perhaps in return for having built them and for maintaining them but the Board does not know if there is any right or property in the roads which should be included in the valuation. Therefore, no allowance will be made for this item.

OTHER CHARGES

The items under this heading are set out in the reconciliation of the two valuations as follows:

<u>AREA I and II</u>	<u>Northland</u>	<u>Palmer</u>	<u>Difference</u>
Books and Records	\$6,300		\$6,300
Accounts Receivable	11,700		11,700
<u>AREA III</u>			
Books and Records	5,100		5,100
Accounts Receivable	300		300
	\$23,400		\$23,400

These charges were discussed by Mr. Van Der Linden and Mr. Dalby at page 32 of the transcript:

"MR. VAN DER LINDEN: These figures represent the cost of books and records of value to the prospective purchaser. The records owned by the company which the new owner would have to duplicate, such as accounting records and systems of procedures, meter records, meter recall inspection records, meter books, record of legal agreements, customer accounts records, records on gas production, there is one other factor that we should have in here, Mr. Massie, is the amount to cover the meter testing licences which are basically a prepaid expense, for a total of, we have taken a total of 10 dollars per customer on these items. In addition, we have added 5,000 dollars as the cost of negotiating and concluding the gas purchase contracts. These amounts are our best estimate of the man hours and material costs involved in producing and maintaining these records.

Q. The 5,000 dollars for the gas purchase contracts I take it are included in the 5,100 shown under Area 3?

MR. DALBY: That is correct."

In the Camrose case, the Board rejected the contention that the books and records and other expense should be included as part of the valuation on the grounds that such

expenses are usually associated with developing the utility as a going concern and as such are excluded for valuation purposes. The Company argues that books and records fall within the meaning of the statutory words "all apparatus and property used for the purpose thereof" and that the Board should distinguish between them and expenses incurred as part of the going concern of the utility. The basis for this argument is that books and records are property and are as essential to the operation of the system as are pipes and fittings and further, that the system could not be operated without them.

There is no question that books and records are essential for the operation of a utility. The question before the Board however, is whether books and records, which are property in a legal sense, are "apparatus and property used for the purposes thereof" within the meaning of the statute for the purposes of valuation. In the Board's view, the cost of books and records are in the nature of an expense which the Company must incur in order to operate the utility as a going concern and therefore do not form part of the property to be valued within the meaning of the statute. While the books and records of the Company would no doubt be useful to the Town, if it decides to purchase the gas system, the Board doubts that the Town, as a municipality operating a utility would keep books and records in a manner identical to that of the Company. Also it was admitted that some of the Company's records are available from other sources. In summary, the Board is not satisfied that the Company's books and records are such an integral part of the system, as pipes and fittings are, that they should be characterized as part of the apparatus and property to be valued. Furthermore, if some part of the

books and records are more useful to the Town than are other parts, there is nothing, as counsel for the Town argues, to prevent the Town from purchasing the useful books and records from the Company under a separate arrangement.

As mentioned in the testimony the item of \$5,100.00 for books and records in area III includes the value of the gas purchase contract which Mr. Dalby agreed was \$5,000.00. The Town concedes that the gas purchase contract has a value and does not dispute this amount.

Accounts receivable do not form part of the property to be valued and would have to be dealt with as an adjustment between the parties at the time of purchase.

C O N C L U S I O N S

The Board has carefully considered the evidence and the opinions expressed by the witnesses called by the parties and has also considered the arguments of counsel.

As the Board has pointed out there are many factors which have to be taken into account in determining the value that should be placed on the gas system owned by the Company in High Prairie.

The Board has come to the conclusion, for the reasons given, that in fixing the value for the High Prairie gas utility system owned by the Company the location of the distribution system mains should be, for valuation purposes, considered as being located in the lanes rather than in the streets where they have actually been placed. On this premise, and having regard to all factors, including the factor of obsolescence to which consideration must be given, the value which the Board finds for that part of the system located in areas I and II as of December 31, 1970 should be fixed at \$315,100.00 made up as follows:

Reproduction cost new of the distribution system -	\$335,000.00
Deduct: loss in value -	54,000.00
	<u>\$281,000.00</u>
Real estate, inventory and equipment -	9,100.00
Cost of boring tunnelling and extending customers' service lines -	25,000.00
	<u>\$315,100.00</u>

The parties have asked the Board to also fix a value for the transmission facilities in area III and the evidence on the value of the facilities in this area tendered at the hearing has been carefully reviewed.. The Board has come to the conclusion that the value of such facilities as at December 31, 1970 should be fixed at \$280,000.00, made up as follows:

Reproduction cost new of transmission and gas supply facilities -	\$313,700.00
Deduct loss in value -	58,000.00
	<u>\$255,700.00</u>
Easements and power lines -	19,300.00
Gas purchase contract -	5,000.00
	<u>\$280,000.00</u>

Each party shall bear its own costs and each shall bear one half of the costs which have been incurred by the Board.

DATED at the City of Edmonton, in the Province of Alberta, this 4th day of October, A.D. 1971.

PUBLIC UTILITIES BOARD

(SIGNED) W. NOBBS

CHAIRMAN

(SIGNED) W. D. ABERCROMBIE

MEMBER

(SIGNED) H. A. WILLIAMS

Certified a true copy,

ACTING MEMBER

Secretary.



IN THE MATTER OF "The Municipal
Government Act": and

IN THE MATTER OF "The Expropriation
Procedure Act": and

IN THE MATTER OF an application by
the City of Edmonton to the Public
Utilities Board for an order fixing
the compensation to be paid by the
City for the expropriation of:
Lots Fifteen (15), Sixteen (16),
Seventeen (17), and Eighteen (18),
all in Block Sixteen (16), in the
City of Edmonton, in the Province of
Alberta, of record in the Land Titles
Office for the North Alberta Land
Registration District as Plan 5493 A.C.
(Alexander Park N.W. 15-52-24-W.4th)
RESERVING THEREOUT all mines and minerals.

BETWEEN:

THE CITY OF EDMONTON

- Applicant

- and -

ARNOLD HROMADA

- Respondent

APPEARANCES:

H. F. Wilson, Esq.	:	for the City of Edmonton
	:	
J. N. Agrios, Esq.	:	for Arnold Hromada

D E C I S I O N

In this application the City of Edmonton (hereinafter referred to as "the City") has expropriated four lots owned by the Respondent, Mr. Hromada, for the purposes of a free-way to be built in the south east part of the city. The application is made by the City under Section 28 of The Expropriation Procedure Act, cap 130 R.S.A. 1970, and the effective date of the expropriation, for the purpose of determining compensation is, pursuant to Section 26 (4) of the Act, the date when the plan was filed in the office of the City Clerk. This occurred on December 3, 1970.

Mr. Hromada's four lots are located on the south east

corner of 58th Avenue and 91st Street in the city, and they will completely disappear under the proposed freeway scheme. The lots measure 33' by 132' making a combined area of 132' square, totalling 17,424 square feet or 0.40 of an acre.

Mr. Hromada purchased the lots in September 1962 for \$9,400.00 for the purpose of storing construction equipment as he was engaged in the construction business at that time. He said the property was useful for that purpose and the frame house, which is still standing on the property, yielded rental income. The house was rented for \$50.00 per month.

In 1966, Mr. Hromada received a letter from the City advising him of a replotting scheme which would include widening 91st Street to the extent that his property would be eliminated and negotiations followed regarding a possible allocation of other land. These negotiations failed to produce agreement on a purchase price or an allocation of property under the proposed replotting scheme. In 1969, Mr. Hromada attempted to sell the property and he received two offers to purchase; one offer in June 1969 for \$13,500.00, and the other in November, for \$13,000.00. Both offers were made subject to the condition that permission could be obtained for development. The offers were made through two real estate firms in Edmonton. Mr. Hromada said he had accepted both offers as they were tendered, but neither transaction could be concluded because in each case the City refused to grant a development permit to the prospective purchaser.

In March, 1970, Mr. Hromada attempted to obtain a development permit himself to build a warehouse and office building and this was also refused by the City for the following reasons: because of the replotting scheme; because it would interfere with the orderly and economic development of the area; and because utility services are not available in the

area. These reasons were set out by the City authorities in Mr. Hromada's application form which was filed as an exhibit. According to the Land Classification Guide, Exhibit 5, Mr. Hromada's proposed development fell within the permitted uses and might have been allowed except for the replotting scheme. Section 15 of the Guide says in part:

" AG - MRL INDUSTRIAL RESERVE DISTRICT

General Purpose

(1) Permitted Uses:

..... The following industrial uses when in conformity with the general requirements of an approved replotting plan or plan of subdivision or where such uses are, in the opinion of the Development Control Officer, unlikely to prejudice a replotting plan or plan of subdivision under preparation:

- (a) warehousing, storage, receiving, distribution, trans-shipment of raw materials, processed or manufactured products, including parts and components, open or enclosed.
- (b) manufacturing,
- (c) servicing and repair establishments,
- (d) commercial, recreational or municipal uses, unlikely to have restrictive effects upon the industrial districts and which are compatible with the industrial uses."

According to the testimony of several witnesses, including two employees of the City, Mr. Hromada's property is located in what could be described as an island of development stagnation. This island, which, under the old subdivision plan, is about four blocks wide and about 1200 feet long, is bounded on the west by 91st Street, on the east by 87th Street, on the north by the Canadian Pacific Railway right-of-way and on the south by the Canadian National Railway right-of-way.

The land on the west side of 91st Street, across the road from the Hromada property, is zoned M-1 Industrial District under the City's Zoning By-law 2135. The land four blocks

over to the east, is zoned M-2 Industrial District under the By-law. Permitted uses under the By-law of these areas include warehousing, storage, receiving and distribution of raw materials and processed or manufactured products. Both of these areas are fully serviced with utilities.

In the AG-MR1 area, the only services available are telephone and electric power. Water is hauled to residences there and heating is by propane gas. There are no indoor sewer facilities.

Services to the developed west side of 91st Street in the M-1 Industrial zone are provided from 92nd Street, but witnesses for the City advised that services to the AG-MR1 area would have to be provided from the east because of the proposed freeway along 91st Street.

* * * * *

Mr. A. Jellis, an accredited appraiser called by the City, said that the market value of the Hromada property as an industrial site was worth \$11,000.00 per acre. The total area being 0.40 of an acre, the value for industrial purposes, in Mr. Jellis' opinion, was \$4,400.00 which excluded the value of the residence, which he considered had no value for industrial purposes. Mr. Jellis said the market was slow in the area due to the lack of sewer and water and also because there were many undeveloped sites in the area to the west where facilities are available. In his approach to market value as an industrial site, Mr. Jellis referred to nine sales of comparable property, all of which are located in the M1 zone area immediately to the west of the Hromada property. Five of these sales were for land situated on the west side of 91st Street, a short distance from the expropriated land and one sale was for land directly across the street from the lots. These sales occurred mostly in 1968 and

1969 and the parcels were mainly between one and two acres in area. None of the sales involved land divided into small lots.

Mr. Jellis said the highest value of the property was for residential purposes and on this basis it was his opinion that the total value was \$6,000.00.

Mr. L. B. Restall, also an accredited appraiser called by the City, concluded that the highest and best use of the property was for industrial purposes and he valued the land on this basis at \$6,500.00 with no allowance for the building. Mr. Restall referred to a number of recent property sales, which included some of the sales used by Mr. Jellis. He said the best indication of the value of Mr. Hromada's property came from two sales. The first of these sales, number nine on his list, Lot 7A, Block 5, Plan 4097 M.C., contains 15,927 square feet in area, sold in October, 1968 for \$7,250.00, or 46¢ per square foot. He said values have increased 20% since 1968 and he considered the present value of this land would be about 55¢ per square foot. This lot is located just west of 88th Street on 62nd Avenue, which is about two blocks long ending in a cul-de-sac.

The other sale, Lot A, Plan 4748 M.C. located at approximately 96th Street and 51st Avenue, with a total area of .55 of an acre or 23,958 square feet, sold in October, 1970 for \$11,640.00, or 49¢ per square foot. This lot was unserviced and had the same zoning classification as the Hromada property.

Richard C. Propp, an appraiser called by Mr. Hromada, prepared his appraisal on the basis that the highest and best use of the property was for the purposes of a building site for an industrial building with showroom, offices and warehouse area. After considering different approaches to value, Mr. Propp arrived at a final valuation of \$13,000.00.

In all of his methods of determining value, he assumed that all local improvement would be available to the property and that the City would issue a building permit to Mr. Hromada to allow him to build a building of the kind the City has already refused because of the proposed freeway scheme.

* * * * *

The main issue in this application is what is the proper method of determining compensation in the circumstances of this expropriation. The City argues that Mr. Hromada's property must, in effect, be valued on the basis of the situation at the time of the expropriation. In this approach the value of the property would have to be determined in the light of the replotting scheme, and the effect that this scheme has had on the Hromada property and the AG-MR1 district in which it is located.

There is no evidence that the actions taken by the City in preventing this area from being developed along the same lines as the adjoining areas was in any way improper and there is no reason to suppose that what was done was not consistent with sound planning principles to assist in the development of a replotting scheme for the purposes of a major freeway for the benefit of the city as a whole.

Counsel for Mr. Hromada argues that the property should not be valued on the basis suggested by the City because the value of Mr. Hromada's property has been affected by the City's replotting scheme. He cites several authorities on the basic principles of determining compensation in expropriations which the Board does not consider necessary to refer to in detail as these principles are well known and are not in issue here. However, on the issue of the effect of the replotting scheme on the value of the expropriated land for

determining compensation, there are several cases which should be considered.

It is a general rule in determining compensation in expropriation cases that no consideration should be given to any increase in value to land because of the scheme for which the land is being expropriated. This seems to the Board to be consistent with the principle that compensation is to be determined according to the value to the owner, and not the taker. While the cases in which the general rule has been most often applied is to avoid enhancement in value, the scheme is also to be ignored if it results in a decrease in value of the land. This principle was expressed by Duff J., as he then was, in Cunard v The King (1910) 43 S.C.R. 88, at page 99 where he said:

" One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this, you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence The circumstances that it is so required (for public purposes) is not to enter into the computation of value as either enhancing or diminishing it."

This principle was followed in this province in an unreported judgment of Milvain J., as he then was, in McKee v The Queen (Jan. 27, 1967). In that case, the claimant's property was expropriated by the Province of Alberta on behalf of the University of Alberta. Prior to the expropriation, which took place in December, 1966, the general area in which the McKee property was located was declared to be a public works area pursuant to certain provisions of The Public Works Act. As the circumstances in the McKee case are quite similar to this application, it is useful to quote from the judgment of Milvain J., to some extent:

On page 4 of his judgment he said:

" The gist of the problem before me may be quite simply summarized: it is the position of the Crown that in valuing this property for the purpose of compensation, a Court in my position cannot consider anything other than a residential value because of the property being, so to speak, condemned from a value point of view by virtue of the freeze order made in August of 1965. The owner on the other hand contends that I am not bound, in considering the elements that go to compensation, to confine my consideration to that of residential property but that I am entitled in law to consider the potentialities of the property as they would have been at the time of expropriation were there not a freeze order. It is my view in law I am not confined to the artificial value which has been placed on this property by the freeze order. To do such, in my mind, would be an extremely inequitable and unlawful thing to do."

After quoting Duff J. in Cunard v the King, (supra.), he said on page 5:

" This same principle was followed by the Court of Appeal in Ontario in the case of Teubner v The Minister of Highways, the citation that I am looking at, at the moment, is in 50 D.L.R. 2nd Edition at page 195. In that case Mr. Justice Roach of the Court of Appeal said at page 201, and I quote:

' The law is well settled that the compensation to which an owner whose lands have been expropriated is entitled, for the lands taken, is their value to him in their then actual condition with all their existing advantages and possibilities but excluding any advantage due to the carrying out of the scheme for which those lands have been compulsorily taken.'

This, of course, carries with it as a necessary corollary that one excludes too, the disadvantages that have been brought upon the property because of the carrying out of the scheme.

The same thought was expressed by Mr. Justice Wilson, as he then was, of the Supreme Court of British Columbia, he now being the Chief Justice, in the case of Electric Power and Re Nanaimo Duncan Utilities Limited in (1953) D.L.R. New Series at page 461 and I don't propose to quote what was said by Mr. Justice Wilson but it is in support of the thesis I make that when land has been given an artificial depreciation in value by a public authority which intends to take it over that then and in such event no court, in fixing compensation, is bound immutably to that artificially decreased value brought about by the authority which in fact is now doing the expropriation

I am therefore of the view that in measuring compensation, as I must do, at this stage, I must measure the value of the property to a prudent owner as of the date of expropriation, in this instance the 14th of December, 1966, assuming to the property the ..

"normal natural propensities it would have had were the freeze order not in existence."

The history of the McKee property is quite similar to Mr. Hromada's property that in about four years before the expropriation in 1962 a developer made an offer to purchase the property for \$52,500.00 on condition that a building permit be issued that would permit commercial use. This offer was followed by a further offer in the same amount but in both instances the transactions were not completed because the City authorities refused a building permit. Milvain J. found on the evidence that one of the great reasons, if not the main reason for the refusal of the permit was because of the opposition of the University for reasons of the future expansion of the University. He assessed compensation at \$58,000.00.

In the present case, the Board is satisfied there is no doubt that the reason why Mr. Hromada was unable to complete the sale of his property for development and later to obtain the required permit to develop the property himself, was because of the City's replotting scheme for the proposed freeway. The Board is satisfied that in determining the value to the owner the value must include all the present and future potential of the property as at December 3, 1970, on the basis that on that date the replotting scheme did not exist.

The rule for determining how compensation is to be awarded can be stated quite simply, but it is not easily applied. Milvain J. had the same problem in the McKee case. Following the statement that he would measure the value of the property as of the expropriation date as if there were no freeze order he said:

" Now so far as this property is concerned the evidence is clear before me that, from a zoning point of view, it is in that strange mystical area under which there is in fact no zoning, where one is guided by a land use,"

"guide; and building permits are granted by the City on the basis of each individual application.

It is clear before me that immediately to the south of this property on 112th Street, that is to say just merely crossing 87th Avenue, a property has been given a development permit which allows a combined commercial-residential use. Now as to whether or not, in the absence of the freeze order, an application with respect to the subject property would succeed no one can say with complete assurance. However, on the balance of probabilities, it would seem to me at least that such a building permit would be granted; because I cannot see within the meaning of the planning legislation, how it could be said that it was necessary from the point of view of the orderly and economic development of the general area that use should be restricted to residential, when immediately across the avenue, such a use has been permitted. However, this is one of the features of uncertainty which do exist and must be borne in mind in fixing a value."

In the present case, the expropriated property is also under the City's land use guide for zoning purposes, and similar to the McKee case, the property is located on the opposite side of the street to land that has been zoned and developed, in this case, for industrial uses. Taking the view that the replotting scheme did not exist on December 3, 1970, the Board can only apply its judgment to determine what would have been the value of the Hromada property on that date. The property has a favoured location on a through street and its position on a corner in close proximity to an existing industrial development. It seems reasonable that at least, on the date of expropriation, the property had an immediate potential for such development. It is possible, perhaps even probable that if the City had not considered a replotting scheme, the whole AG-MR1 area might be as fully developed for industrial purposes as are the adjoining areas. Following this line of reasoning, one could say that if there had been no such scheme, the Hromada property would have been developed prior to the date of expropriation. In the Board's view, this would be going too far into the realm of conjecture and would fail to take into account all of the uncertainties

which are encountered in land development. Furthermore the Board is in no position to say what would have been the requirements of the City authorities faced with an application in the absence of the replotting scheme. As was stated by Mr. Justice Milvain in the McKee case:

" Now as to whether or not, in the absence of the freeze order, an application with respect to the subject property would succeed, no one can say with complete assurance."

After reviewing the evidence of values given by appraisers he said:

" I am satisfied this owner cannot be given the highest value which can be placed on this property of something in the neighbourhood of \$12.00 per foot because of the fact that discounting the existence of the freeze order there is involved the intangible uncertainty as to whether or not a building permit would be obtained; I think it would; but still it cannot be valued on the basis that it exists because it does not exist and for that uncertainty, of course, there must be some deduction from top value."

The Board is of the same view with respect to the Hromada property. In all probability, a building permit would have been obtained at the time of, if not before the date of the expropriation, but the land cannot be valued on the basis that a permit had been granted, and this fact must be reflected in determining compensation. For this reason the Board must reject the approaches to valuation employed by Mr. Propp, whose appraisal was prepared on the assumption that the City would issue a building permit to allow the construction of a warehouse and office building.

The comparable sales referred to by the appraisers have been carefully considered by the Board. Properties in close proximity to the Hromada property referred to by the appraisers were viewed by the Board with counsel. The Board also viewed several of the properties which the appraisers considered to be most comparable to the Hromada property. In the artificial position which the Board

must take to determine compensation, the Board has not been able to regard any of the recent sales referred to by the appraisers as being truly comparable to the expropriated property. Sales of property across the street in the M1 zone were for parcels about one acre or more in size, which the Board appreciates may sell for a lesser price per square foot, generally speaking, than do small lots. The Board considers that sales on the south side of 58th Avenue in the AR-M1 zone must have been subject to the influence of the replotting scheme. Other sales in the Board's view, do not compare as to location.

The Board is of the view that the best evidence of value of the property, ignoring the replotting scheme, are the offers received by Mr. Hromada in 1969, which were made conditional to the obtaining of a building permit for industrial purposes. In considering the offers as evidence of value, the Board recognizes that offers to purchase are, generally speaking, not the best kind of evidence. Counsel for the City has referred the Board to the following excerpt from Challies on The Law of Expropriation, Second Edition, page 104 where the learned author says:

"4. Offers to Purchase

Offers to purchase 'are always open to suspicion, easy of fabrication and generally unsatisfactory, and probably in most cases should be rejected entirely'; particularly if they are oral. An offer made to avoid litigation by either the owner or the expropriating party should not be used even as a starting point in determining value. However, a bona fide offer may be considered."

Both of the offers made to Mr. Hromada are written offers made through different real estate firms in Edmonton. There is no suggestion that these offers were

other than bona fide and counsel for the City does not suggest otherwise. The first offer, made in June of 1969 was for \$13,500.00 and this was followed in November, 1969 by an offer for \$13,000.00. Mr. Hromada said he had accepted each offer in turn subject to the condition of obtaining a development permit and that each application for a permit by the prospective purchaser was refused. Although not clearly established by the evidence, it seems only reasonable that the refusal of the first application preceded the second offer. There being no reason to assume that this fact would be unknown to the second offeror, it seems reasonable that the refusal of the first application had some effect on the amount of the second offer, because of the greater possibility that the application by the second offeror would also fail.

In any case, both offers were made on the basis of obtaining a development permit and the Board has said that the land should not be valued on that basis and a discount factor must therefore be taken into account in determining the value of the property.

Bearing in mind that the offers were made in 1969, a year earlier than the date of expropriation, and that generally speaking, land values rose between 1969 and 1970, the Board has concluded, all factors considered, that the value of the property as at December 3, 1970, is \$13,000.00 and this amount is fixed by the Board.

In addition to the sum of \$13,000.00 the City will pay Mr. Hromada interest on such sum at the rate of seven (7%) per centum per annum from December 3, 1970 until paid.

The Board wishes to commend both counsel for their able and thorough presentations.

Costs are awarded to the Respondent in such amount as may be agreed to by the parties failing which as fixed by the Board.

DATED AT EDMONTON, in the Province of Alberta, this 18th day of October, 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) W. NOBBS

CHAIRMAN

(SIGNED) W. D. ABERCROMBIE.

MEMBER

Certified a true copy,

Secretary.



IN THE MATTER OF "The Municipal
Government Act":

AND IN THE MATTER OF a certain by-law
passed by the County of Leduc No. 25
to establish water and sewer rates for
the Hamlet of Beaumont, water rates
for the Hamlet of Nisku and farm and
other water rates:

AND IN THE MATTER OF an application to
the Public Utilities Board appealing
the water rates levied by the County
of Leduc No. 25:

BETWEEN:

TOM OLIVER ET AL

Applicants

- and -

COUNTY OF LEDUC NO. 25

Respondent

APPEARANCES:

T. Oliver, Esq.	:	for the Applicants
	:	
W. A. Bradbury, Esq.	:	for the County of Leduc No. 25

D E C I S I O N

This hearing arises out of an appeal to the Public Utilities Board under Section 280 of The Municipal Government Act, chap. 246, R.S.A. 1970, by the Applicants in respect of water rates imposed by the County of Leduc No. 25 (hereinafter referred to as "the County") under a by-law passed by the County. The appeal received by the Board consisted of a letter signed by thirteen water consumers and these persons were all served with a notice of this hearing. Only nine of the Applicants appeared and Mr. T. Oliver, one of the Applicants, informed the Board that he would act as spokesman for all.

The by-law in question is By-law No. 883-68 passed by

the County on March 19, 1968, the relevant part of which provides for the levying and collecting of the various water and sewer rates is as follows:

- "1. That the water rate for the Hamlet of Beaumont, other than where water meters are installed, be a flat charge of \$8.00 per month.
2. That the water rate for the Hamlet of Beaumont, where water meters are installed be constituted of a service charge of \$3.00 per month, with the water rates as herein set out to apply, but with a minimum charge of \$5.00 per month for water excepting -
 - (a) The Beaumont Curling Club will pay the rates as provided for in Section 2 for only the months of November 1st to December 31st and January 1st to April 30th, inclusive, in each year.
3. That water meters must be installed for any hook-ups along the line between the Hamlet of Nisku and the Hamlet of Beaumont and any water line extension from Beaumont and that in such cases a service charge of \$7.00 per month be made in addition to the water rates as herein set out, but with a minimum charge of \$5.00 per month for water.
4. That the water rate for the Hamlet of Nisku, other than where water meters are installed, be a flat charge of \$5.00 per month for water.
5. That the water rate for the Hamlet of Nisku, where water meters are installed, be constituted of a service charge of \$7.00 per month, with the water rates as herein set out to apply, but with a minimum charge of \$5.00 per month for water.
6. That in cases of where a flat rate for water is charged and if, in the opinion of the Council, the water user is using more than 5,000 gallons per month, then the Council reserves the right to install a meter and charge in accordance with the service charges and rates as set out in this By-law.
7. That the sewer rate for the Hamlet of Beaumont shall be \$5.00 per month, excepting -
 - (a) The sewer rate for schools shall be \$5.00 per month per classroom.
8. The following water rates are to apply:

		<u>Gallons</u>	<u>Per 1000 Imperial Gallons</u>
Between	1,001 to	5,000 cost to consumer will be	- \$1.90
	5,001 to	11,000 cost to consumer will be	- 1.80
	11,001 to	25,000 cost to consumer will be	- 1.70
	25,001 to	45,000 cost to consumer will be	- 1.60
	45,001 to	85,000 cost to consumer will be	- 1.50
	85,001 to	130,000 cost to consumer will be	- 1.41
	130,001 to	175,000 cost to consumer will be	- 1.33
	175,001 to	225,000 cost to consumer will be	- 1.26
	225,001 to	625,000 cost to consumer will be	- 1.20
	625,001 to	1,820,000 cost to consumer will be	- 1.15
	1,820,001 to	9,335,000 cost to consumer will be	- 1.10 "

All the Applicants, except one who resides in the Hamlet of Nisku, live on small acreages or farms along the water line between the Hamlet of Nisku and the Hamlet of Beaumont, all within the County, and are charged water rates in accordance with clause 3 of By-law 883-68. The Applicant residing in the Hamlet of Nisku has a water meter installed and his rates are in accordance with clause 5 of By-law 883-68 and are exactly the same rates that are imposed on the other Applicants.

Section 280 of The Municipal Government Act states:

"280. Any user of a public utility being aggrieved respecting service charges, rates and tolls made to such user may by application appeal to the Public Utilities Board and the Board, if satisfied that such service charge

(a) does not conform to the public utility rate structure established by the municipality, or

(b) has been improperly imposed, or

(c) is discriminatory,

may make an order varying, adjusting or disallowing the whole or in part of such charge."

Since enactment of The Municipal Government Act in 1968 several applications under Section 280 have been dealt with by the Board and, as in the previous applications of this kind, the Board takes the position that all the powers under Part I of The Public Utilities Board Act are applicable to the Board in exercising its jurisdiction under Section 280 of The Municipal Government Act.

* * * * *

In 1962 the County constructed approximately six miles of water line from Nisku to Beaumont primarily to serve the residents of Beaumont who did not have an adequate source of water. The water for the line is obtained from the Leduc-Strathcona Water Board, who owns a water line running from the City of Edmonton to the Town of Leduc. Metering facilities are located at or near Nisku to measure the volume of water delivered to the County's line.

In the month of June, 1971 the records of the County indicate that there were 118 consumer accounts, comprising 90 installations without a meter and 28 installations metered. The geographical location of the services may be summarized as follows:

	<u>Metered</u>	<u>Unmetered</u>	<u>Total</u>
Hamlet of Beaumont	5	72	77
Hamlet of Nisku	2	13	15
Farm and small holdings	<u>21</u>	<u>5</u>	<u>26</u>
	28	90	118
	<u>==</u>	<u>==</u>	<u>==</u>

No evidence was adduced at the hearing relative to the various size water services which the County has installed but from supplementary information filed at the Board's request the Board has been able to determine the size of 22 of the 28 metered installations as follows:

	<u>Beaumont</u>	<u>Nisku</u>	<u>Other</u>	<u>Total</u>
5/8" service	1	-	4	5
3/4" service	1	2	7	10
1" service	-	-	5	5
1 1/4" service	<u>2</u>	<u>-</u>	<u>-</u>	<u>2</u>
	4	2	16	22
	<u>==</u>	<u>==</u>	<u>==</u>	<u>==</u>

The largest size metered services on the County's water system are the two 1 1/4" diameter connections which supply water to schools. There are five other metered services with a 1" diameter connection and the balance of service connections appear to be of an average domestic service of either a 5/8" or

3/4" diameter pipe. There are no large commercial or industrial enterprises located in the vicinity of the County's water line and indeed the Board's personal knowledge of the area confirms that the majority of customers in the area could be classified as "domestic service".

* * * * *

Water rates were originally authorized by the County under By-law 646-63 on April 10, 1963 with the rates under that by-law exactly the same as under the present water By-law 883-68 except for clauses 1 and 2 pertaining to the Hamlet of Beaumont. Clauses 1 and 2 of By-law 646-63 were as follows:

- "1. That the water rate for the Hamlet of Beaumont, other than where water meters are installed, be a flat charge of \$12.00 per month.
2. That the water rate for the Hamlet of Beaumont, where water meters are installed, be constituted of a service charge of \$7.00 per month, with the water rates as herein set out to apply, but with a minimum charge of \$5.00 per month for water, excepting -
 - (a) The Beaumont Curling Club will pay the rates as provided for in Section 2 for only the months of November 1st to December 31st and January 1st to April 30th, inclusive, in each year."

Mr. Bradbury, the County's Secretary-Treasurer, commented on the rate changes between By-law 646-63 and By-law 883-68 as follows:

"MR. WILLIAMS: Maybe while he is examining that, Mr. Bradbury, maybe you could summarize just what happened between By-law 646 and By-law 83, what was the effect?

A. By-law, I think it's 663, 68, I can't read it --

MR. WILLIAMS: The last by-law which is in effect now is 883 --

A. 883-68, that by-law was passed in an effort to try and promote some building in the Hamlet of Beaumont. Because of the water charge and the sewer charge the council felt that in some manner perhaps, I mean we

" have a loss every year on the water line and we might take a few more losses and be able to get some more houses in Beaumont and maybe eventually get the line on a paying basis. I don't think there was any, no thought of discrimination, at the time anyway.

THE CHAIRMAN: You are saying the idea was to reduce the water and sewer rate in the Hamlet of Beaumont?

A. Just the water rate.

THE CHAIRMAN: Just the water rate in the Hamlet of Beaumont.

A. Yes.

THE CHAIRMAN: As they were under By-law 646-63?

A. I think that's the only difference, reduced from the minimum charge of \$12 to a minimum charge of 8 with a proviso that if anyone was using more or if the countil felt they were using more than 5,000 gallons of water we would install a meter. The flat charge of \$8 would effectively cover 5,000 gallons on the schedule."

* * * * *

It appears to the Board from an examination of By-law 883-68, and from the testimony of Mr. Bradbury, that the County considers that the water line is serving three distinct areas as follows:

The Hamlet of Beaumont,
The Hamlet of Nisku,
Farms and small holdings along
the water transmission line.

In the Hamlet of Nisku there are presently 13 unmetered services that are charged a flat rate of \$5.00 per month. Mr. Oliver questioned Mr. Bradbury about the reduced water rate for Nisku. At page 29 of the transcript, in response to Mr. Oliver's question, he said:

"Q. MR. OLIVER: In the By-law 646-63, it's stated the rate was \$12 in the Hamlet of Nisku and the Hamlet of Beaumont if no meter was installed, that's what the by-law states, and did the Hamlet of Nisku refuse to pay the initial rate and get a reduced rate before they hooked up the water?

"A. Perhaps they refused to as it were to the office, they might have come in, I think there was only two people living there at the time, the store keeper and the garage and they had a house, and the elevator man, and maybe one more house; they had water, they had wells, apparently not too much difficulty getting water, they had pressure systems. They come in and ask, what's the rate for Nisku, no way would we pay that, we got water, we don't need it but we might consider \$5. Now, that could have been the start of why they got a \$5 minimum rate. In other words, we give them water for \$5, it was \$2 that helped pay for the water line otherwise they wouldn't hook up. I don't think it's proper that that attitude should have been taken but we were looking for any little few dollars you might say we could get, we call it gravy to the extent they hooked on and it didn't cost us anything, particularly, and if they didn't, well ...

MR. WILLIAMS: But you didn't know how much water they were using.

A. No, just --

MR. WILLIAMS: You don't know whether the \$5 covered it or not.

A. The same thing would apply, just for a small house, I think later on there was a trailer, this store, garage, we told them they would have to have a meter but in any case at any time when we thought they were taking more than 5,000 gallons a month we would put a meter or we would put in a meter and they would be faced with a service charge, and the Nisku service charge I think was \$3."

In addition to the water rates set out in By-law 883-68 only the residents of Beaumont are assessed an annual frontage tax of \$0.24 per front foot to pay for a portion of the cost of the water system. The testimony of Mr. Bradbury in this regard appears at page 28 of the transcript as follows:

"MR. WILLIAMS: Have you got any figures of comparison, what they would pay in Beaumont including what they are paying for frontage tax for this water system plus their rates, what the overall would be; have you got anything like that you could submit to the Board.

A. No, I have no actual figure but I could give a hypothetical figure, perhaps if they had a hundred foot lot the frontage tax would be at 24¢ would be \$24, if they had a hundred foot -- now, this is for water, not sewer. A hundred foot lot at 24¢ would

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" be \$24 frontage tax, and then in addition they would pay the minimum of \$8 for water, say up to 5,000 gallons. If we thought they were using more than 5,000 gallons we would put in a meter, and if we put in a meter we charge a service charge.

THE CHAIRMAN: This applied to Nisku as well as --

A. Yes, it applies, if the meter goes in the service charge goes with the meter.

THE CHAIRMAN: There is no frontage charge in Nisku?

A. No frontage charge in Nisku.

THE CHAIRMAN: The only place with a frontage charge is Beaumont?

A. Is in Beaumont. They are the originators of the line, they are the ones who in a sense have the responsibility for paying for the line.

MR. WILLIAMS: When you say they have the responsibility for paying for the line was it to be fully recovered from them?

A. Not really, to the extent they are a hamlet, they are part of the county and all the rate payers in the county are responsible for the underpayments or if the line don't pay its way all the rate payers make up the deficiency."

* * * * *

In summary, the annual minimum charges relative to water service in the three areas appear to be as follows:

	<u>With Meter</u>	<u>Without Meter</u>
Hamlet of Nisku:		
Service charge	\$84.00	-
Commodity	<u>\$60.00</u>	<u>\$60.00</u>
	<u>\$144.00</u>	<u>\$60.00</u>
Hamlet of Beaumont: *		
Service charge	\$36.00	-
Commodity	<u>\$60.00</u>	<u>\$96.00</u>
	<u>\$96.00</u>	<u>\$96.00</u>

"This does not include frontage tax of \$0.24 per front foot for the cost of the water system.

	<u>With Meter</u>	<u>Without Meter</u>
Farms and small holdings:		
Service charge	\$84.00	No flat
Commodity	<u>\$60.00</u>	rate
	<u>\$144.00</u>	

Mr. Oliver said the Applicants contend the present water rates are discriminatory and urges the Board to determine a just rate between the rates established for Nisku and Beaumont but not to exceed \$8.00 per month. In addition he contends that all consumers should have meters or none should have meters.

* * * * *

The majority of consumers on the County water system enjoy flat rate service whereby they pay only \$8.00 per month in the Hamlet of Beaumont for unmetered consumption of water and only \$5.00 per month in the Hamlet of Nisku.

If, instead of being charged on a flat rate basis, such customers were charged metered water rates, the volume of water which they would receive for the amount they are now paying per month on the flat rate basis would be:

Beaumont

Monthly service charge	\$3.00
Commodity metered	
2600 gals. at \$1.90 per	
1000 gals. - \$4.94 (min.)	<u>5.00</u>
	<u>8.00</u>

Nisku

Monthly service charge	\$7.00
Commodity metered	
2600 gals. at \$1.90 per	
1000 gals. - \$4.94 (min.)	<u>5.00</u>
	<u>\$12.00</u>

It will be observed that on a metered basis a customer in Nisku would be required to pay a \$12.00 per month minimum

charge rather than the \$5.00 per month flat rate basis which he presently enjoys.

For the month of June, 1971 the County summarized the purchase and disposition of water for the system as shown below:

	<u>Gallons</u>
Water purchased from the Strathcona-Leduc Water Board	1,018,980
Less line loss - 6%	<u>68,160</u>
Net gallons	950,820
Metered sales (including bulk meter station sales of 30,125 gallons)	<u>391,295</u>
Unmetered sales	<u>559,525</u>
Number of unmetered services	95
Average unmetered sale	5,850 gallons

Similarly the average monthly consumption of unmetered consumers for each month from January to May in 1971 was determined by the County to be 5,390, 4,530, 5,390, 4,540 and 7,780 gallons respectively. The Board is not convinced, on the evidence adduced, that the County should assume that it has a water loss of 6%, or that there is in fact any loss on this rather short system. Assuming no line loss for the month of June, 1971, the total consumption by the unmetered accounts would amount to 627,685 gallons which represents an average consumption of 6,600 gallons for each service.

From an examination of the County's list of meter readings for the month of June, 1971, the following analysis has been made:

	<u>Total Consumption (Gallons)</u>	<u>Average (Gallons)</u>
5 services with monthly consumption over 20,000 gallons	185,260	37,052
8 services with consumption between 10,000 and 20,000 gallons	106,880	13,360
13 services with consumption under 10,000 gallons	<u>69,510</u>	5,347
	<u>361,650</u>	

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This analysis reveals that these thirteen services, who are not permitted by the County to purchase water on a flat rate basis, have an average consumption of 5,347 gallons, which is about 8 $\frac{1}{2}$ % less than the average non-metered consumption per customer of 5,850 gallons. This in the Board's view is clearly discriminatory.

* * * * *

Section 280 of The Municipal Government Act provides that the Board "may make an order varying, adjusting or disallowing the whole or in part of such charge" if it is satisfied that the service charge, rates and tolls are discriminatory. Thus, under this section, the Board functions as a tribunal to correct discriminatory rates imposed by a municipality rather than as a rate regulating agency under the provisions of The Public Utilities Board Act.

Under Section 102 of The Public Utilities Board Act a municipality owning or operating any public utility may by by-law provide that its operations will be subject to the jurisdiction of the Public Utilities Board. The County has not passed such a by-law and the present water rates were established by the County under By-law 883-68 on March 19, 1968 when The Municipal District Act was still in force before being repealed and replaced by The Municipal Government Act on June 1, 1968. Section 277 of The Municipal Government Act permits a County to set its own utility rates subject only to the provisions of Section 280.

Considering Section 280 in the light of these provisions the Board is of the view that in conferring the powers on the Board, the Legislature did not intend the Board to carry out its duties in a manner that would detract from the clear rights of municipalities to fix their own rates. In the Board's view, the Legislature intended that the Board's prime function in an application such as is now before the Board is to correct inequalities in municipal utility rates and charges but not to substitute its opinion of what the rates and charges should be

for the opinion of a municipal council. Had the Legislature intended otherwise, Section 280 would have contained appropriate language.

As a rate setting agency, the practice of the Board is to hold a rate hearing in which evidence of relevant financial and economic matters are presented by expert witnesses in various fields and all facets are argued before the Board by counsel. In such a hearing all aspects of the effect of fixing utility rates and charges on consumers are discussed and considered at length. It is only after this procedure has been followed that the Board sets utility rates. This is the practice the Board would follow if the County passed the appropriate by-law to bring its water and sewer utilities under the jurisdiction of the Board. Acting as it must, as a tribunal under Section 280 and not as a regulatory authority, the Board has concluded that it should not interfere with municipal utility rates complained of under the section beyond the point of correcting injustices that have been established by the evidence adduced at the hearing.

To this principle should be added the proviso that in a hearing where it is readily apparent that the interests of the municipality and the complainants could best be served by varying a rate or charge and there is sufficient evidence for a new rate or charge to be set and the circumstances are such that the Board would not consider itself to be usurping a municipality's power to fix its own rates, the Board may in the proper case exercise its power to that extent.

It is apparent from the evidence submitted that the County has not set water rates at a level that will ensure that all the annual operational and capital costs of the water system are recovered as substantial deficits in each of the years 1963 to 1970 inclusive have been incurred and charged against the general revenue of the County. Greater losses were anticipated when the County gave a rate reduction in 1968 to the consumers in the Hamlet of Beaumont by reducing the water charge by \$4.00 per month with the hope that the reduced water rates would encourage building and that eventually the system might be on a paying basis.

The Board is only concerned in this application with the equability of rates being charged the metered consumers and must rely on the evidence submitted at the hearing in forming its judgment as to the fairness of the rates being charged. Based on the recorded consumption of the following ten consumers for the month of June 1971 the Board finds that the average consumption of 5,716 gallons is not in excess of the average unmetered sale and that in all fairness the following ten consumers should have been charged water rates in accordance with clause 1 of By-law 883-68, which provides for water service at a flat rate of \$8.00 per month:

	Consumption in June 1971 (Gallons)
T. Oliver	5,480
M. N. Garneau	6,330
J. Woods	4,610
P. Guzak	5,780
T. Hartman	4,670
R. Hogg	8,730
G. Kinsella	3,830
L. H. Schneider	2,170
Helen Rivard	9,610
J. Johnson	<u>5,950</u>
Total -	<u>57,160</u>
Average -	<u>5,716</u>

In addition the Board considers all the other metered consumers should be charged metered water rates as now applied to the Hamlet of Beaumont under clause 2 of By-law 883-68.

Concurrently with this decision the Board will issue its order to the following effect:

The water accounts of the ten consumers hereinbefore referred to shall be immediately credited for all amounts paid by them in excess of the flat \$8.00 per month charge since April 1, 1968.

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The water accounts of all the other metered services will be credited with any monthly service charge in excess of \$3.00 per month imposed since April 1, 1968.

In conclusion the Board would like to make the observation that the entire water system should be metered. Each month the County has to pay for all water that is metered into its system from the Leduc-Strathcona Water Line and it seems only prudent management that the disposition thereof should be as closely controlled as possible by metering each customer's consumption.

DATED AT EDMONTON, in the Province of Alberta, this Nineteenth day of October, A. D. 1971.

PUBLIC UTILITIES BOARD

(SIGNED) W. D. ABERCROMBIE

MEMBER

(SIGNED) H. A. WILLIAMS

ACTING MEMBER

Certified a true copy.

Secretary



IN THE MATTER OF "The Pipe Line
Act"; and

IN THE MATTER OF "The Expropriation
Procedure Act"; and

IN THE MATTER OF an application to
the Public Utilities Board by
Hudson's Bay Oil and Gas Company
Limited for an order granting to the
Applicant a right-of-way over, across
and under certain lands for the
purpose of constructing and maintaining
an oil pipe line and fixing the amount
payable by the Applicant for such
interest and for incidental damages
and costs.

BETWEEN:

HUDSON'S BAY OIL AND GAS COMPANY LIMITED

Applicant

- and -

WILLIAM JAMES COPITHORNE AND ROYALITE OIL
COMPANY LIMITED

Respondents

APPEARANCES:

R. J. Hazlett, Esq.	:	for Hudson's Bay Oil and Gas
	:	Company Limited
	:	
A. D. Hunter, Esq.	:	for William James Copithorne

D E C I S I O N

This is an application by Hudson's Bay Oil and Gas Company Limited (hereinafter referred to as "the Applicant") to the Public Utilities Board for an order declaring the estate or interest to be granted to the Applicant over, across and under certain lands owned by William James Copithorne (hereinafter referred to as "the Respondent") for the purpose of constructing and maintaining an oil pipe line for the transmission of crude oil and condensate and fixing the amount of money payable by the Applicant for such interest and for incidental damages and costs.

The land required for the right-of-way is described as follows:

A strip of land partly 60 feet in width and partly 150 feet in width situate in the North West Quarter of Section Thirteen (13) and a strip of land 150 feet in width situate in Block "A", Plan Cochrane 2538 K, which lies in the North Half of the South Half of Section Thirteen (13), all in Township Twenty-four (24), Range Four (4), West of the Fifth Meridian, in the Province of Alberta, containing 10.63 acres more or less;
RESERVING THEREOUT all Mines and Minerals.

The right-of-way is delineated on a plan registered in the Land Titles Office for the South Alberta Land Registration District as Plan 4636 J.K.

The original authorization for the Applicant to enter upon the land for the purpose of commencing construction was granted by the Board by its Interim Orders No. 27632 and 27634, each dated June 24, 1966, and this date, accordingly, becomes the effective date of the expropriation.

The subject property was described as being located 11 miles west and approximately 2 miles south of the west limits of the City of Calgary, on the north side of the Elbow River, and situated approximately 1 mile south of a good gravel road servicing the area. Access to the property is located in the north west corner of the section. The lands lie approximately 4 miles west of the community and school facilities located at Springbank and approximately 12 miles east of the resort community of Bragg Creek. The upper portion of the North West Quarter of Section 13 provides a good view of the surrounding area, including the river valley and mountains to the west. The southerly portion of the quarter section and a portion of Block "A" in the South Half of Section 13 is some 50 feet lower

in elevation than the flat bench area to the north and is considered to be part of the flood plain of the Elbow River, which crosses the most southerly portion thereof. In replying to counsel's questions, Mr. N. T. J. McNally, land consultant and the appraiser called by the Applicant, described the land as follows:

" From the river north the elevation is slightly higher than the water level, and you continue north through a treed area for approximately 600 feet and then there is quite a wet area that has a stream at the northerly part of the trees and then it's wet for a considerable distance there. Then it starts to rise. By this time we are in about the centre line between the quarters. Between the southwest and northwest and still in the area and going north from there it begins to rise again as we get further into the northwest quarter. And there is a hill and in on top of that, the high ground in the northerly portion of the Northwest of 13."

Travelling from south to north in a north-westerly diagonal fashion the pipe line right-of-way crosses 1.83 acres of river area, 2.00 acres of treed area and 3.50 acres of hillside and low pasture area. On reaching the top of the hill the right-of-way traverses 3.30 acres of hayland and exits at approximately the center of the north boundary of the North West Quarter of the section. The lands both below and above the hill or bluff were, at the date of expropriation, being used by the Respondent for agricultural purposes and the lands are still being so used. Mr. McNally expressed the opinion that the market value of the subject property, as of July, 1966, was \$300.00 per acre. In support of this opinion he listed in his Appraisal Report, a copy whereof was entered as Exhibit 156-5, the particulars of the sales of four parcels of comparable farm lands which had taken place in the general area. He was further of the opinion that the highest and best

use of the land was its present use, which was for agricultural purposes, until such time as speculative purchases or small holding development reached the area of the subject property on a definite basis. In this regard he stated:

" In considering the location of the subject land and the surrounding area, and considering the development of lands going west from Calgary, I feel this land is probably on the edge of a speculative area. Around the City of Calgary there is a margin or a circle, if you like, that you will find lands trading in some cases for development. Other cases are out from the edge of the development for speculative reasons. And if one was to consider, say a 10 mile margin west of the City limits, which would take in the area that has any small holdings pretty well, and at this stage - and as of 1966, a small holding development would not be out that far. It would probably be in the order of 6 miles out. Then I feel this is on the edge of what one might consider as a speculative margin. However, I feel the property is influenced by that."

Mr. D. J. Rollheiser, a real estate agent, was called to give evidence on behalf of the Respondent. He was tendered as an expert witness and accepted by the Board as being a duly qualified real estate agent having a specialized knowledge in the sale and purchase of rural properties, particularly properties west of the City of Calgary. He filed, as Exhibit 156-16, a copy of the south west portion of the ownership map for the Municipal District of Rockyview, whereon he had indicated, by means of various coloured round stickers, the location of the subject property; the community of Springbank; parcels of land which had been sold; and parcels which were offered for sale. It was his opinion that the highest and best use of the flat land below the bluff was for resort cottage development and he stated that if the land was placed on the market it would sell readily, within one year, at a price of \$5,500.00 for each half acre parcel. He said the highest and best use of the land

above the bluff was country residential and it was his opinion that if this land was marketed in parcels of 20 acres or less it would sell for \$1,000.00 per acre.

On examining the whole of Mr. Rollheiser's evidence it is quite clear to the Board that his opinion of market value is based on the assumption that the subject lands have been zoned to their highest and best use and that actual subdivision has taken place. In the case of *In Re Board of Education for North York v. Village Developments Ltd.* (1956) 3 D.L.R. (2d) 161, it was held:

"While the general rule for fixing compensation for expropriated land is to determine its present value to the owner in terms of all its advantages, present and future, which the land possesses, nevertheless it is wrong in determining the value of land, which, admittedly is suited for a subdivision development, to ignore the statutory requirement of approval to any subdivision plan under planning legislation and to fix compensation as if the owner were entitled to proceed to an immediate sale of the land as building lots. Regard must be had to all the eventualities foreseeable or only vaguely foreshadowable by which a prudent person, looking forward immediately before the expropriation would be influenced."

In fixing compensation it is proper for the Board to consider the future subdivision potential of the area but it is not proper to proceed upon the basis that the anticipated zoning change has been accomplished and the subdivision plan approved. For this reason the expressions of opinion of Mr. Rollheiser regarding the market value of the subject lands are of no assistance to the Board in reaching a conclusion as to the amount of compensation to which the owner is entitled and these opinions, therefore, must be rejected. The Board has, however, given careful consideration to the particulars of the

sales referred to by Mr. McNally and Mr. Rollheiser and it is apparent that the development pattern, if a true pattern can be said to exist, is as was suggested by Mr. McNally. The number of small parcel sales increase as the proximity to the City of Calgary increases. The same trend is evident, to a lesser degree, with respect to the communities of Springbank and Bragg Creek. The Board is of the opinion that the approach used by Mr. McNally in arriving at his conclusion regarding the market value of the subject lands is appropriate in the circumstances of this case. Bearing in mind the principle that a small parcel of land would likely command a higher price per acre on the market than would a large parcel and the fact that the subject lands possess special scenic and location qualities, the Board has made an upward adjustment in McNally's estimate to compensate for these factors and will award compensation for the interest in land acquired by the Applicant on the basis of \$400.00 per acre.

Much time was spent at the hearing while witnesses having special qualifications or experience expressed opinions on a variety of subjects. For example, there were opinions concerning the possibility and probability of flooding in the river flood plain area; the necessity of using riprap as a means of preventing erosion of the river bank; the amount and cost of fill required to bring the river lands out of the flood plain area; the difficulties which may be encountered in obtaining approval for the development of a cottage resort site; the price of marketable lots and other related matters. In the Board's view this evidence does little more than to conclusively establish that

before approval could be obtained for a resort cottage development, a great deal of money would have to be expended. This fact would be obvious to any knowledgeable purchaser and would, in the Board's view, reduce substantially the price he would be prepared to pay for the river front property in its raw state. This is one of the factors considered by the Board in arriving at its conclusion regarding the quantum to be awarded for compensation.

Damages occasioned during the course of construction of the line and confined to the right-of-way above the bluff were agreed on at the hearing in the sum of \$963.40. With respect to the restoration of the right-of-way below the bluff the Board is satisfied that Mr. McNally's approach to the problem is reasonable and will allow the sum of \$150.00 to cover the expense involved in reseeding the area to grass. After considering the present use of the land and the uses to which it may subsequently be put, the Board has concluded it is not necessary that an effort be made to return the tree belt to its original condition. In the event that a cottage resort subdivision is proceeded with a relatively large number of trees would have either to be destroyed or relocated. If the present use of the land is continued the presence of a number of mature trees on the right-of-way in the tree belt area would increase the attractiveness of the property and thereby enhance its potential and value for subdivision. After examining the estimate submitted by the landscaper called by the Respondent the Board is of the opinion that Mr. McNally's estimate in this regard is low and will make an award in the sum of \$800.00 to cover this item.

With respect to injurious affection, the Board is unable to accept the opinions of either Mr. Rollheiser or Mr. Trouth in this regard, such opinions being entirely unsupported by specific sales data or other corroborative evidence. However, as the pipe line right-of-way crosses the subject property at an angle, it may well have an adverse effect on the quantity and availability of suitable land for residential purposes and is bound to have some effect on the layout of any proposed subdivision. On the evidence, the Board is of the opinion that while the possibility of proceeding with a cottage resort type of development in the flood plain area of the subject lands is very remote, the probability of subdivision on a 20 acre basis appears to be quite strong. The Board will allow the sum of \$2,000.00 to cover any loss suffered by the Respondent under this head of damage.

Concurrently with this decision the Board will issue its order declaring the interest in land granted to the Applicant and the compensation and damages awarded to the Respondent.

The Respondent is also awarded interest at the rate of 7% per annum on such award from the date of the Interim Orders to the date of the final hearing.

Costs will be awarded to the Respondent in the amounts set out in the order to be issued concurrently herewith.

DATED AT EDMONTON, in the Province of Alberta, this 30th day of November, A.D. 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) K. J. LEATHEN

Certified a true copy.

MEMBER

Secretary



IN THE MATTER OF "The Municipal
Government Act": and

IN THE MATTER OF "The Expropriation
Procedure Act": and

IN THE MATTER OF an application by the
County of Newell No. 4 to the Public
Utilities Board for an order fixing the
compensation to be paid by the County
on a claim for injurious affection
arising out of the expropriation of land
for the purpose of widening a highway.

BETWEEN:

THE COUNTY OF NEWELL NO. 4

- Applicant

- and -

WILLIAM KIRSCHENMAN

- Respondent

APPEARANCES:

K. W. Lutes, Esq.	:	for the County of Newell No.4
	:	
D. Wilkins, Esq.	:	for William Kirschenman

D E C I S I O N

This application arises out of a previous application before the Board to fix the amount of compensation to be paid to the Respondent for a strip of land expropriated for widening a road in the County. The amount of compensation for the land was fixed by the Board in decision No. 29266 dated June 3, 1969. A claim for injurious affection which was made at the original hearing was withdrawn by the Respondent on the basis of certain actions which the County proposed to take to rectify the matters complained of. Settlement of the items of injurious affection were not completed and the present application has been made to the Board.

At the beginning of the hearing there was a question in the Board's mind as to the validity of the present claims and counsel were invited to submit argument with respect to the statutory

requirements of section 27 of The Expropriation Procedure Act. Counsel chose to proceed with the hearing and the Board deems any irregularities in procedure to have been waived by the parties.

The road which was widened by the expropriated strip runs by the Respondent's farm house which is located in the Brooks area of the province. The Respondent owns land on both sides of the road which is operated as one farm by his sons. There are several items of claim which can be conveniently summarized as follows:

1. S.W. 14-20-14-4 - (a) interference with access,
(b) interference with irrigation,
(c) loss of cultivation area,
2. N.W. 11-20-14-4 - loss of access to pasture,
3. Damage to cattle corral,
4. Interference with access to farm yard and permanent water drainage problem,
5. Damage to farm house,
6. Disturbance during construction and interference with cattle pasturing,
7. Loss of calf,
8. Dust and noise from traffic.

The Respondent has not claimed specific amounts as compensation for the items of damage, although estimates of cost have been tendered in respect of some items. Counsel for the Applicant submits that some of the matters for which a claim has been made are not recoverable under the recognized heads of damage for injurious affection. If this contention is correct, the Board has no jurisdiction to award compensation for damages which may be compensable by other remedies but not as a claim for injurious affection.

The Board's jurisdiction to award compensation stems from section 27 of The Expropriation Procedure Act, under which the present application has been brought. Subsection (1) of section 27 provides:

"27.(1) A claim for compensation for injurious affection caused by the expropriation of other land or by a work constructed or to be constructed on the expropriated land shall be made by an owner by filing the claim and particulars thereof with the clerk or secretary-treasurer

(a)

(b)

The omitted clauses in the subsection and other subsections contain procedural provisions which need not be considered in this application.

The claims all arise from the construction work undertaken by the Applicant in widening and changing the level of the road surface which affected the Respondent's land on both sides of the road. Before considering the items of claim, the Board wishes to review briefly the principles applicable to claims for injurious affection.

The general rules for determining compensation for injurious affection are contained in "Challies - The Law of Expropriation" second edition, chap. 10. The learned author states at p. 132 that there is a distinction in cases of injurious affection between claims where no land is taken and those where land is taken; and the discussion of the latter cases commences at page 138. On page 139 Challies says:

"There are three principal conditions that must be fulfilled before a claim for injurious affection will lie, if the land of the claimant has been taken namely:

- (a) the lands affected must be held with the lands actually taken; and
- (b) from damage to the lands not taken must arise from acts done upon the lands taken; and
- (c) the damage must not be too remote and must arise from the expropriation."

In addition to the above rules there is a general rule which states that in order to recover damages an owner must

have taken reasonable steps to mitigate or lessen the damages as they occurred. This rule is most often invoked in actions for damages in tort but the Board is of the view that the rule applies to injurious affection claims where some action by the owner might have mitigated a loss which is claimed. A useful statement of this rule is to be found in the judgment of the Appellate Division of the Supreme Court of Alberta in *McDonnell v Municipal District of Sugar City*, (1944) 1 W.W.R. 95. In that case, the municipality removed a Texas gate which allowed some cattle to get into his crop but the damage was small compared with the damage done by cattle that came in other ways through lack of fencing. On page 96, Harvey C.J.A. said:

"We have come to the conclusion that on the findings of fact the plaintiff was entitled to a declaration that he was entitled to some judgment, which would be appropriate to the injury done. Evidence was given of rather substantial damage but it is a well recognized principle of law that a man cannot stand by and see his property destroyed or injured if he can by reasonable methods prevent that taking place. If he does not prevent it he certainly cannot recover for the actual damages suffered, but can only recover for the reasonable expenses he was put to in preventing the injury from taking place."

Turning to the first item of claim, the evidence is that regrading and widening the road has reduced accessibility to the S.W.¼ of Section 14 because the approach to the field has been made steeper and it is now more difficult to maneuver machinery from the road to the field, particularly in bad weather. The level of the new road is apparently considerably lower than was the old road and the Applicant found it necessary to slope the bank from the field to the road and the photographs entered as exhibits clearly show that there is a considerable slope to the field entrance. In making the sloped bank the Respondent has lost the use of less than one acre which was formerly useable and, in addition, the irrigation ditch on the Respondent's field has been disturbed.

The evidence on the extent of damages under item 1 of the claim is conflicting and difficult to assess. With respect to the approach to the field being too steep, the Applicant apparently offered to make a new approach at the west end of the field with less slope but the Respondent would not agree. The portion which was lost to use apparently lay between the ditch and fence and could not be used for growing crops in any event. The irrigation ditch was not a large canal but a head ditch operated and maintained for the particular field. No estimate of the extent of loss was given and the evidence about the original usefulness of the ditch for irrigating the field leaves the matter of compensation in doubt. The public works supervisor for the County, whose evidence was not rebutted, said the irrigation ditch was not touched by the construction work. He also said the ditch was made with a plough and ploughed over each year.

As to item 2, the loss of cattle access to pasture in the N.W.¼ of Section 11, the Board has doubts as to the validity of the claim. There is a branch of a creek known as "One Tree Creek" which flows under the road through a culvert and across the pasture in that quarter section. A year or so before the expropriation took place, the Applicant extended the culvert beyond the edge of the road inside the pasture fence and part of the culvert was covered with soil which created the cattle crossing. After the expropriation, the photographs tendered in evidence show the widened road and the fence running across the mouth of the culvert. The crossing which formerly existed has now disappeared and the claim is for a new cattle crossing. The original crossing was apparently constructed by the Applicant by arrangement with the Respondent, the details of which are not known to the Board. The issue in this

item of claim appears to have reference to the manner in which a new crossing is to be constructed. The Respondent wants to have the culvert extended and fill put over it at an estimated cost of \$1,000.00 and the Applicant has refused but offered to construct a bridge crossing. This offer was refused by the Respondent as he built his own bridge crossing which washed away. The photographs of the culvert and creek show a fair sized pool where the culvert discharges, but about 20 to 30 feet beyond that the creek narrows down to a very narrow and shallow water course. The Board doubts that this item is a valid claim for injurious affection, but an allowance will be made as the Applicant has chosen to admit liability, albeit only for nominal damages.

The third item of claim, for damage to the Respondent's cattle corral because of erosion caused by changing the course of the creek is not, in the Board's view, a valid claim. The evidence is that the creek diversion took place entirely on the Respondent's land and not from what was done on the expropriated land. The claim fails because of the second principle referred to by Challies (supra).

Item number 4, the access problem and permanent water drainage condition is, in the Board's view, a valid claim. Although the Applicant raised the level of the road and increased the flow of run-off snow and water, a culvert was installed which the evidence indicates does a reasonable job of directing water away from the farm yard. However, the Respondent said that in periods of very wet weather, the culvert does not handle all the water and some water flows down the approach to the farm yard, creating wet conditions where none was experienced before the road reconstruction, and erodes the supports of one of the Respondent's bridges. Water drainage problems were also created in a pasture near the corrals where none existed

before with the result that at times a part of the pasture becomes too soft to use.

Item number 5, the damage to the farm house, is, in the Board's view, not established as connected with the road and no award will be given.

Item 6 is a claim for disturbance of cattle pasturing operations during construction. Again the evidence is conflicting and difficult to assess. During construction, a fence was left down and cattle escaped into the Respondent's crop. Evidence was called to show that steps were taken by the Applicant to prevent cattle from escaping by the posting of guards. The Board is not satisfied that the witness called by the Applicant was completely knowledgeable in respect of the cattle problem but at the same time the Board has concluded that the Respondent did not do what he reasonably could have done to prevent or mitigate the damage. No estimate of damage was given.

Item 7, the claim for loss of a calf, is not established to the Board's satisfaction as a valid claim for injurious affection.

The last item of claim, item 8, is for increased dust and noise from traffic on the new road which the Respondent said was not noticed with the old road. No details of the extent of the claim were given and no specific amount is claimed. The Board has concluded that increased noise and dust would be experienced as a result of the level of the road being raised and, the widening of the road surface would bring traffic closer to the farm house than it was on the old road.

In summary, the Board finds that the Respondent has valid claims for injurious affection in items 1, 4, 6 and 8 but the evidence does not support substantial awards for any of the claims. In addition, the Applicant admits liability in a nominal amount for the cattle crossing claim

in item 2.

In all of the items for which the Board is satisfied an award of compensation should be made there is little or no evidence to assist the Board in determining the amount of compensation and it is left to the Board as a matter of judgment.

No reasons have been advanced by the Respondent which have persuaded the Board that he is entitled to an award of a substantial amount for the damages which he alleges he has sustained. On the basis of the evidence the Board is satisfied that an award of \$600.00 will adequately compensate the Respondent for the various heads of damage to which the Board has referred in this decision and an order covering such an amount will be issued concurrently herewith.

On the matter of costs, each party will bear his own costs.

DATED AT EDMONTON, in the Province of Alberta, this 18th day of November, 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) W. D. ABERCROMBIE

MEMBER

Certified a true copy,

Secretary.

NO. 30362

File: Ex-Co-92-6



IN THE MATTER OF "The Pipe Line
Act"; and

IN THE MATTER OF "The Expropriation
Procedure Act"; and

IN THE MATTER OF an application to
the Public Utilities Board by Gulf
OIL CANADA LIMITED for an order
granting to the Applicant a right-of-
way over, across and under certain
lands for the purpose of constructing
and maintaining an oil pipe line and
fixing the amount payable by the
Applicant for such interest and for
incidental damages and costs.

BETWEEN:

GULF OIL CANADA LIMITED

Applicant

- and -

JUNIPER DEVELOPMENT & SUPPLY COMPANY
LTD., HERBERT R. WINKELMAN, WILLIAM
LECKELT AND DEPARTMENT OF TRANSPORT

Respondents

APPEARANCES:

W. N. Richards, Esq.	:	for Gulf Oil Canada Limited
	:	
D. G. Ingram, Esq.	:	for Juniper Development &
	:	Supply Company Ltd.

D E C I S I O N

This is an application by Gulf Oil Canada Limited
(hereinafter referred to as "the Applicant") to the Public
Utilities Board for an order declaring the estate or interest
to be granted to the Applicant over, across and under certain
lands owned by Juniper Development & Supply Company Ltd.
(hereinafter referred to as "the Respondent") for the purpose
of constructing and maintaining an oil pipe line for the
transmission of gasolines, diesel fuel, aviation fuels, solvents

and heating oil and fixing the amount of money payable by the Applicant for such interest and for incidental damages and costs.

The land required for the right-of-way is described as follows:

A strip of land 50 feet in width throughout situate in the North Half of the West Half of the South West Quarter of Section Twenty-four (24), and the East Half of the South West Quarter of Section Twenty-four (24), both in Township Fifty (50), Range Twenty-five (25), West of the Fourth Meridian, in the Province of Alberta, containing 2.76 acres more or less; RESERVING THEREOUT all mines and minerals.

The right-of-way is delineated on a plan registered in the Land Titles Office for the North Alberta Land Registration District as Plan 4739 R.S.

The original authorization for the Applicant to enter upon the land for the purpose of commencing construction was granted by the Board by its Interim Order No. 29821, dated April 27, 1970, and this date, accordingly, becomes the effective date of the expropriation.

The subject property is situated approximately $6\frac{1}{2}$ miles south of the Edmonton City limits, about $1\frac{1}{2}$ mile east of the Edmonton International Airport, $1\frac{1}{2}$ mile south of the Nisku settlement, and 4 miles north of the Town of Leduc. The land was described in Exhibit 6-11 as follows:

"The subject quarter section is adjacent the present north traffic arm of Highway #2. The westerly 33.93 acres is divided on a north-south axis by the C.P.R. and a municipal road adjacent the railway to the east. This severance leaves a parcel containing approximately fourteen (14) acres west and twenty (20) acres east of the railway.

The westerly 14+ acres (parcel #1 on map) are bounded on the north by a small pasture, on the south by cultivated land, on the east by the

"railway and municipal road, and on the west on Highway #2. This parcel is untreed and uncultivated. It is relatively high and flat at the north and south ends with a small natural water course running from east to west through the centre and culverted under the railway and highway.

The 20± acres (parcel #2 on map) immediately east of the railway are bounded to the north by a municipal road and cultivated land; to the south by cultivated land; to the east by cultivated land and a slough and to the west by municipal road and the railway. They are partially wooded and cultivated and have good drainage.

The 80 acres (parcel #3 on map) is bounded on the north by a municipal road and cultivated land; on the south and east by cultivated land and on the west by cultivated and wooded land. Topographically, the most northerly 20± acres are high and under cultivation. The most southerly 60± acres are low slough land, flooded in spring and used as pasture in the summer."

The westerly 14 acres are effectively isolated with Highway 2 to the west and the railroad to the east. The remaining 20 acres of the west portion and the easterly 80 acres are served by a municipal gravel road running along the north boundary of the property. The pipe line right-of-way runs in an east-west direction across the property and abuts the north boundary thereof on the south.

Area data set forth in Exhibit 6-4 is as follows:

"Land immediately surrounding the subject is chiefly in farm use. Most of the surrounding land is under cultivation and is gently rolling with satisfactory drainage.

Land in the general area of the subject land is not zoned, but is governed in use and development by Edmonton Regional Planning Commission policies and guidelines and by Provincial highway regulations.

The Canadian Pacific Railway freight and passenger line, which runs roughly parallel to Highway 2 between Edmonton and Calgary, crosses the smaller parcel of the subject land. Spur line service could apparently be made available to land such as the subject in order to facilitate industrial use where approved by appropriate planning authorities.

"Land north and east of the subject land has been subdivided into acreages of from 3 to 40 acres in area for residential use. Such subdivision has not been permitted on land immediately surrounding the subject land.

However, land immediately northeast of the subject land has been subdivided into parcels of approximately 5 acres in area for industrial use.

The subject land, and land in the immediate vicinity, is the object of a Notice in respect of D.O.T. zoning regulations. These regulations are aimed at controlling building activity on lands which are near the airport and which are in line with existing and planned flight paths."

Mr. H. A. Berg, a qualified engineer with some eleven years experience in the pipe line industry, testified that he was the project engineer in charge of the construction and operation of the relevant pipe line and that, as such, was responsible for the maintenance and repair of the line. He stated that a 50 foot right-of-way was required in order that repairs may satisfactorily be made to the line. In this connection he tendered in evidence a sketch (Exhibit 6-3) showing the right-of-way in cross section and the type of equipment which would be used to effect repairs to the pipe line without taking it out of service. Mr. Berg was cross-examined at some length but no witness was called by the Respondent in connection with this matter. The Board is satisfied, on the evidence, that a 50 foot right-of-way is necessary in order that "in-service" repairs may be effected with a minimum of off right-of-way damage.

Evidence relating to the market value of the subject property was tendered on behalf of the Applicant by Mr. D. N. Liteplo and on behalf of the Respondent by Mr. R. Enright, each of whom is an accredited appraiser. Mr. Liteplo's

Appraisal Report (Exhibit 6-4) contained particulars of the sales of 10 comparable parcels of property and details of the 'asking price' for 3 other properties. Appended to the Appraisal Report was a Supplemental Report which contained Mr. Liteplo's opinions with respect to compensation for the taking of the easement and for injurious affection. For the assistance of the Board a sketch of the subject property had been prepared and was entered as Exhibit 6-5. Mr. Liteplo made the following comments in connection therewith:

"With respect to this sketch, the parcels that I have labelled A, parcel A, the long rectangular parcel, is the 79.01 acre parcel and I have it shown here, based on information given to me by the officials in the county office of Leduc, assessors, as a matter of fact, that this parcel A consisting of 79.01 acres is approximately twenty-two acres in water, which is year round water; approximately 30 acres in peaty meadow which is subject to flood; and 27.01 acres currently under cultivation.

Parcel B, which is divided almost in half by the north-south railway right-of-way on the municipal road allowance, consists of 33.38 acres; 10.04 are on the west side of the railway track, abounded then by the railway track on one side and by the north bound highway 2 on the other side, consists of 10.04 acres which I found currently to be in grass. The remainder of it is approximately 15.34 acres in bush at the top and about eight acres in cultivated land at the bottom."

It is noted that there are minor acreage variations in the description supplied by Mr. Liteplo and the one supplied by Mr. Enright but the Board does not consider these differences to be material. Mr. Liteplo's opinion of the market value of the subject property, as of June 2, 1970, was for parcel A - \$400.00 per acre and for parcel B - \$600.00 per acre. In arriving at this conclusion he stated that he had used the market approach, having decided that the best indication of value was evidenced by the sale of comparable nearby properties.

It was his opinion that the highest, best and most profitable use of the land was for agricultural purposes until such time as it could be developed for industrial use. In his Supplementary Report, after expressing the opinion that market evidence indicates that purchasers do not adjust their offer to compensate for future loss resulting from the existence of an easement, concludes with the observation that: "It is the appraiser's opinion that calculation of, and payment in compensation for, this sort of injurious affection will be justified only when the market shows that it recognizes same (witnessed by general payment of significantly lower prices for land with easements as against land free of easements)."

Mr. Enright's Appraisal Report (Exhibit 6-11) contained particulars of 6 comparable sales and 3 listings for sale. A market approach was used and a 'before and after' technique was employed to arrive at the conclusion that the estimated loss in market value of the subject property resulting from the acquisition of the interest in land required for right-of-way was \$2,560.00. His estimate of market value was as follows:

for westerly 14 acres	- \$ 500.00 per acre;
for 20 acres east of railway	- 1,000.00 per acre;
for northerly 20 acres in East Half	- 1,000.00 per acre; and
for remaining 60 acres in East Half	- 300.00 per acre.

There was filed as an Addendum to Exhibit 6-11 a letter from Mr. Enright to Dr. A. Q. Minsos, dated September 13, 1971, together with a schedule setting out details of 2 additional sales of property and one further listing. The letter refers to

a proposed plan of development which had but recently been formulated and which could not have been known to prospective purchasers at or about the date of expropriation. As a result of the information received Mr. Enright revised his estimate of market value of the westerly 14 acres upward to the sum of \$1,000.00 per acre.

In connection with injurious affection his report states:

"In addition to the area taken, a further strip 50 feet in width running parallel the portion expropriated is limited as to its utilization. This would not appreciably affect the westerly 14+ acres with its prospective industrial utilization. It would affect the market value of the land east of the tracks with its potential residential use. From a value of \$1,000.00 per acre the value of the portion affected would tend to approach some nominal amount say \$100.00 per acre."

Mr. Enright calculated that the reduction in market value due to injurious affection was \$2,106.00. Referring to the highest and best use of the subject property, his report stated:

"The highest potential use of the westerly 14 acres is most probably industrial dependent upon construction of the new north arm of Highway #2.

The remaining 20 westerly acres plus the 80 acre parcel provides a gross 100 acres for subdivision into three and four acre parcels surrounding a small lake."

Dr. A. O. Minsos, on being called to the stand on behalf of the Respondent, advised that he was the secretary-treasurer and a principal shareholder in the company. He said the land had been bought for the purpose of creating a low cost housing development thereon. A plan of the proposed development was entered as Exhibit 6-10. He said that the

company had held the land from 8 to 10 years already and that it would be premature to apply for subdivision approval for possibly another 3 years. It was his opinion that the acquisition of the right-of-way would render useless 40 building lots having a total value of \$20,000.00. He conceded, on cross-examination, that the prohibition contained in the Subdivision and Transfer Regulations under The Planning Act with regard to building near a pipe line would not be any more restrictive than those contained in the County resolution which provided for a building setback of 150 feet from the center of a municipal road. He felt, however, that a person probably wouldn't buy a lot adjacent to a pipe line carrying a highly explosive gas.

After having given careful consideration to each of the sales and listings referred to, the Board is of the opinion that the estimate of market value submitted by the appraiser called by the Applicant is a better indicator of value of the subject property than that submitted by the Respondent's witness and, having regard to the future potential which this land possesses, will make an award for compensation for the interest in land acquired by the Applicant in the sum of \$1,356.00.

The Board is of the opinion that the prices being paid for land in the area is a clear indication that such land has a strong potential for development to a higher and better use. On the authorities, the Board is bound to make some allowance for injurious affection. The Board does not consider that Mr. Enright's approach to the question of quantum, being entirely unsupported by sales data or otherwise, can be accepted. On considering the location of the right-of-way in relation

to existing building prohibitions relating to pipe lines and municipal roads and considering further the evidence in connection with the probable future use of the land, the Board has concluded that an award in the sum of \$1,000.00 will adequately compensate the Respondent for all claims under the head of injurious affection.

Mr. C. G. Johnson, a landman employed to act on behalf of the Applicant, expressed the opinion that the sum of \$200.00 would constitute a fair compensation for the destruction of a strip of trees and bush along that portion of the north boundary of the West Half of the quarter section lying to the east of the railway. Dr. Minsos did not claim any specific amount for the loss of trees but he did state that, because of the prevailing winds, the most important trees had been removed. For so long as the land is used for agricultural purposes the destruction of a portion of the shelter belt would result in little, if any, loss to the Respondent. If and when the land is developed for industrial purposes, which appears to be its most probable future use, most, if not all, of the trees would likely be removed. The trees, however, did add an element of value to the property and the Board will make an award in the sum of \$300.00 to cover the claim for the loss thereof.

Concurrently with this decision the Board will issue its order declaring the interest in land granted to the Applicant and the compensation and damages awarded to the Respondent.

Costs and interest will be awarded to the Respondent at such amounts as may be agreed upon between the parties, failing

which, at such amounts as may be fixed by the Board.

DATED AT EDMONTON, in the Province of Alberta, this
30th day of November, A.D. 1971.

PUBLIC UTILITIES BOARD,
(SIGNED) K.J. LEATHEN
MEMBER

Certified a true copy.

Secretary

NO. 30364



File: Ex-Mun-16-40

IN THE MATTER OF "The Municipal
Government Act": and

IN THE MATTER OF "The Expropriation
Procedure Act": and

IN THE MATTER OF an application by the
City of Calgary to the Public Utilities
Board for an order fixing the compensa-
tion to be paid by the City for the
expropriation of certain lands owned by
Interfaith Housing.

BETWEEN:

THE CITY OF CALGARY

- Applicant

- and -

INTERFAITH HOUSING

- Respondent

APPEARANCES:

P. B. H. Rondeau, Esq.	:	for the City of Calgary
	:	
F. J. Fleming, Esq., Q.C.	:	for Interfaith Housing

D E C I S I O N

This is an application by the City of Calgary (herein-
after referred to as "the City") to the Public Utilities
Board made under the provisions of The Expropriation Procedure
Act for an order fixing the compensation to be paid by the
City for lands which it has expropriated from Interfaith
Housing (hereinafter referred to as "Interfaith"). The
lands expropriated by the City are:

Block Z and that portion of Block Y which lies
to the East of a straight line between a point
in the Northern boundary of the said Block Y
at a distance of 337.65 feet, measured Westerly
thereon from the North East corner of the said
Block Y, and a point in the Southern boundary
of the said Block Y at a distance of 334.50 feet,
measured Westerly thereon, from the South East
corner of the said Block Y on Plan Riverview
Calgary 383 A.C. excepting thereout the widening
of 26th Avenue S.E. on Plan 3470 J.K., and
excepting thereout all mines and minerals and
the right to work the same.

Municipally the parcel expropriated is bounded:

on the north by 26th Avenue S.E.;
on the south by 28th Avenue S.E.;
on the west by an extension northerly
of 31st Street S.E.; on the east by
34th Street S.E.

The parcel, containing 11.72 acres, is delineated and outlined in red and designated as New Block 4 on a plan referred to as Exhibit "B" in an affidavit of counsel for the City filed with the Board which accompanied the application made by the City to the Board on October 6, 1970. The parcel expropriated was taken from the easterly part of a 26.5 acre parcel owned by Interfaith.

The effective date for determining compensation is, pursuant to section 26 (4) of the Act, the date the plan of the land to be expropriated is filed in the office of the secretary-treasurer or the clerk of the municipality. According to the affidavit of counsel for the City filed with the Board before the hearing, the plan was filed with the City Clerk on June 16, 1970. The purpose of the expropriation is for a park site in the east part of the City in a new subdivision named Dover West.

The facts of this application are unusual in that before it became known that a park site would be required, Interfaith was assisted and encouraged by the City to acquire the parcel, from which the park site was taken, for the development of a low cost housing project. Normally, in expropriation proceedings, events which precede the date of expropriation are irrelevant to the question of determining compensation but in this case a brief history of the dealings between the parties leading up to the expropriation and the progression of the planning steps of the Dover West subdivision will assist in understanding the issues which have been placed before the Board.

However, before providing such an outline it may be useful to list the names of the witnesses called by the parties.

The City called:

- | | |
|-----------------------|---|
| DAVID GLENDON JUDD | - Land development officer employed by the City of Calgary, Land Department, |
| MICHAEL VAUGHAN FACEY | - Co-ordinator of Current Operations in the Planning Department of the City of Calgary, |
| ROMAIN L. KLAASEN | - An accredited Appraiser and member of the Appraisal Institute of Canada, |
| FRANK L. BYRNE | - Development Officer for the City of Calgary. |

Interfaith called:

- | | |
|-----------------------|---|
| JOHN JOSEPH MARSHALL | - President of Interfaith Housing, |
| MARTIN COHOS | - Senior partner in the firm of Cohos Delesalle & Evamy, Architects, |
| JAMES FRANCIS FENDALL | - President of Middleton-Tait Mortgages Ltd., and a director of Interfaith Housing, |
| ROBERT M. DAGG | - An Architect and a member of the firm of Zickefoose & Dagg, Architects, |
| DAVID E. DEAN | - Real Estate Agent and an employee of Milliken & Company Agencies, |
| WILLIAM E. ROWBOTHAM | - An accredited Appraiser with Wm. Carroll & Associates Appraisals Ltd. |
| HERBERT A. DALGARNO | - A Real Estate Agent with the firm of J. B. Bailey Associates. |

* * * * *

In 1968 a group of churches in Calgary decided to become involved in assisting to alleviate the housing shortage in the City and a committee was established for the purpose of looking into the possibility of limited dividend housing under section 16A of the National Housing Act. This type of housing attracted the group because of the long term low interest rate mortgages which were available under that Act. The committee of the various churches later became incorporated under the name of "Interfaith Housing". In October 1968, the City was approached and informed that the churches were interested in obtaining a parcel of land. This resulted in meetings between the City and Interfaith representatives and several parcels of land were considered. According to Interfaith witnesses, the City was most co-operative in assisting Interfaith to find a site and in fact did all the investigation of possible sites for them. These investigations resulted in the City Planning Department informing Interfaith about a parcel of land located in the south east part of the City at 28th Street S.E. and 26th Avenue S.E. This parcel, containing 26.5 acres, was purchased by Interfaith on the recommendation of the planning department who advised that the site was most desirable as the Interfaith project fitted in well with the overall conceptual plan that the planning department had for the entire area.

Mr. Facey, who was then the senior subdivision sector planner with the planning department, said he dealt with Interfaith about the proposed housing development. Interfaith witnesses said it was Mr. Facey who had told them about the parcel, but Mr. Facey said the City land department had directed them to the area. At the time he was discussing the project with Interfaith, Mr. Facey said the City was very interested in low cost housing and he was involved in a plan

to develop the area bounded on the north by 26th Avenue S.E.; on the south by 34th Avenue S.E.; on the east by 36th Street S.E.; and on the west by about 28th Street S.E. This area, in which the Interfaith land is included, became known later as the Dover West subdivision.

The 26.5 acre parcel was purchased by Interfaith in December of 1968 for \$80,000.00 and the transfer was executed on June 17th, 1969 and registered in the Land Titles Office on July 7th, 1969. When Interfaith bought this parcel, the general area to the south and east was largely undeveloped and in the early stages of planning. An outline plan was not approved until June 11, 1969. The general area where the Interfaith property is located became part of the City some years earlier when the Town of Forest Lawn was annexed.

Before the annexation, the area was zoned for agricultural purposes by the Calgary Regional Planning Commission. This zoning was apparently changed to D.C. (direct control) at the time of annexation and was so zoned at the time of the Interfaith purchase. It is quite clear from the testimony of the Interfaith witnesses that at all times during discussions with various City officials, Interfaith was interested in the parcel only for the purposes of a low cost housing project. The Board is satisfied that from the time the City first suggested the parcel, Interfaith discussed with the City the suitability of the land for the construction of 400 units of apartment blocks and town houses. The Board is also satisfied that the City encouraged Interfaith to proceed on that basis and at the time the land was bought, Interfaith had no reason to suspect that they did not have the blessings of the City for the whole project. Interfaith bought the land

for that purpose and shortly thereafter engaged the services of an architect to design the project with the idea of proceeding with the immediate development of 200 of the units in the west portion of the parcel. After receiving his instructions, the architect, Mr. Dagg, consulted with the chief architect of the City. From the testimony of Mr. Dagg's discussion with the City's chief architect, and the testimony of Interfaith witnesses of their discussions with other City officials, it is clear that Interfaith had every reason to believe that the City had no objection to the project. However, it cannot be said that the City had given its final approval for the development of the project because planning had not advanced beyond preliminary stages.

The first step taken in planning the Dover West subdivision, which includes the Interfaith property, was when an outline plan of the area was approved on June 11, 1969. This plan, Exhibit 4, shows the Interfaith parcel containing 23.92 acres designated as "Proposed Multiple Family". The Interfaith parcel is shown in blank except for a roadway on the east and west boundaries. Mr. Facey pointed out that the Planning Commission had authority to approve subdivisions but land use and densities were under the authority of City Council. He said that an outline plan often shows land uses as well as subdivisions but its primary purpose is to deal with the subdivision of land. He said density studies were to be made after the outline plan was approved.

The matter of a park for the subdivision first came to light about the end of September 1969, and discussions were held between the City and Interfaith about acquiring a portion of the Interfaith parcel for the park. These discussions, which dealt with possible alternative methods whereby the City could acquire the portion, did not end in agreement

and the City took the necessary steps to expropriate. During the period when discussions took place, the Planning Commission was also involved in considering an application by Interfaith for subdividing the west half of their property. At about the same time, the Planning Commission was also involved in making recommendations to City Council for rezoning of the west half.

The progression of events can be summarized briefly: Exhibit 8, a plan attached to a certified copy of the Calgary Planning Commission Minutes of October 29, 1969, shows the Interfaith property divided into two parcels; the westerly parcel containing 12.6 acres, designated "B - 57.3 persons per acre"; and the easterly parcel designated "Community Reserve" containing 11.32 acres. The minutes of the meeting indicate that the Commission made recommendations for allowable densities based on the proviso that the City purchase the park area. The recommended density for the Interfaith project was 15.3 dwelling units per acre (57.3 persons per acre) for a total of 192 units over a site of 12.6 acres.

On December 3, 1969 the Planning Commission considered a rezoning application on the westerly twelve acres of the Interfaith property for a specific development comprising mostly town houses. The application was for a rezoning from D.C. to R-3 (direct control to general residential district). Mr. Facey said the application was recommended for approval as it complied with the outline plan which had been approved by the Commission on October 29th. He said that the density of 15.3 dwelling units an acre or 57.3 persons per net acre is actually less than R-3 density, which allows a maximum of 30 units per acre or 90 persons. The application went to City Council and was approved on January 5, 1970.

On January 9, 1970, the Planning Commission considered an application for a subdivision plan of the west portion of the Interfaith property. The minute, Exhibit 9, refers to the acquisition of the park site to the east of the subdivision and the densities previously approved on October 29th and at the bottom of the preamble of the minute is the following statement:

"The property is zoned 'D-C'".

Under the heading "Planning Recommendation" the minute states that the plan of subdivision is approved subject to certain conditions. Condition (d) states:

"(d) that in accordance with Section 25 (1) (b) of The Planning Act, a cash payment be made in lieu of 'reserve'; and

(e)

At the bottom of the minute is the following:

"Note:- The property is zoned 'D-C' and 'R-3'".

The same application was considered again on February 4, 1970. The minute of this meeting, also part of Exhibit 9, is as follows:

"The Commission, at its meeting of Jan. 9, 1970, had approved this plan of subdivision subject to a payment in lieu of reserve, however it is now noted that the area that was to have been acquired for park purposes will now have to be expropriated. This being the case, it has been suggested that 'reserve' be taken in the form of land rather than cash

Planning

Recommendation: That condition (d) as outlined in the minutes of Jan. 9, 1970 (being the condition requiring cash in lieu of reserve) be rescinded and the following condition applied:- that a 'reserve' parcel, to contain 2.65 acres, be shown on the plan."

The matter was again considered by the Commission on April 15, 1970. The minute of this meeting, also part of Exhibit 9, referred to the two previous meetings and the

Commission adopted the following recommendation:

"that a cash payment be made in lieu of 'reserve' but that said payment be deferred by agreement pending a decision by the Expropriation Board on the amount that the City must pay for the park land. Said 'reserve' payment would be calculated using this figure as the basis for the payment."

* * * * *

The broad issue in this application is the value of the expropriated parcel for the purposes of determining the compensation to be paid. Interfaith takes the position that the City, in effect, gave approval to Interfaith to develop 400 housing units on the whole 26.5 acre parcel before the expropriation took place. Four hundred units for the whole area amounts to about 15 units per acre, and Interfaith says it should be compensated according to the value of land useable for that kind of development. The Board does not agree that Interfaith had been given approval for the development of the parcel in the sense that it had obtained all necessary authorizations from the various City planning authorities to proceed with a complete town house development. The evidence makes it quite clear that the City wished to encourage this sort of development in the area but there is nothing to suggest that at the date of expropriation Interfaith was in the position that it had detailed subdivision plans approved and that it had obtained the required zoning for a town house development.

The City's position is that the expropriated parcel should be valued according to the zoning restrictions which were applicable on June 16, 1970. The City's argument is that the expropriated parcel could not be used for a high density town house development unless an appropriate by-law was passed by the City. Because such a by-law has not been passed the expropriated parcel must be valued on the basis of the

allowable uses under the applicable zoning which, the City says, would permit development for residential purposes at a density of 25 persons or 6.58 housing units per acre.

These arguments raise an important issue in law concerning the proper determination of compensation in expropriation schemes which must be considered at length. It is a principle in determining compensation in an expropriation matter that compensation is to be assessed on the basis of the value to the owner without reference to the scheme under which the expropriated powers are exercised, meaning that any increase or decrease in value caused by the scheme is to be ignored. This principle was stated by Duff J., as he then was, in Cunard v The King (1910) 43 S.C.R. 88 at pages 99 and 100 where he said:

"One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence The circumstances that it is so required (for public purposes) is not to enter into the computation of value as either enhancing or diminishing it."

This principle is usually invoked in cases where the value of the land is enhanced by the proposed scheme in order to prevent inflated awards, but there are cases where expropriations have tended to decrease values and the principle has been applied to prevent awards from being so affected. This principle was applied in Re Gibson and City of Toronto (1913) 28 O.L.R. 20, where the City passed a by-law prohibiting the erection of buildings within 17 feet of the street with the clear intention of reducing the amount of compensation which would be paid to landowners when the City later expropriated the 17 foot strip to widen the street.

On page 23 McLaurin J. A. said:

"It would indeed be a gross abuse of the powers conferred upon The City Corporation if it should be able to use such powers to depreciate the value of property which it was about to acquire."

In the same case Hodgins J.A. drew a distinction between by-laws which were either part of the expropriation scheme or essential for the expropriation and those that were not.

He found that the by-law, although not part of the expropriating machinery, was part of the plan adopted by which the lands would be taken. On page 28 he said:

"If that was its sole purpose, then, I think, it became part of the general scheme and should be so treated. If it is not part of the expropriating machinery as such, it is part of the plan adopted, of which it and the valuation of the lands by arbitration were essential factors. I see difficulties in the way of holding that by-law No. 5545 should be treated as part of the expropriation proceedings. But in this case it makes little difference in the result.

It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation, but, on the other hand, that authority ought not to be able, by the exercise of its powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation."

A more recent example where a court found that the exercise of a power, although not part of the expropriation machinery, was part of the general scheme, is in *Re Nanaimo-Duncan Utilities Ltd.* (1950) 3 D.L.R. 461. That case involved the expropriation by the British Columbia Power Commission of a small, privately owned utilities company. It was argued on behalf of the Power Commission that the amount of compensation should be reduced because the company could no longer carry on the business of a public utility in the province without a license. It was government policy to refuse a license to a private company and it was clear that the reason for the refusal was to enable the Power Commission to provide utility services throughout the province. The Court

found this policy to be part of the scheme of the expropriation. The Commission's argument was referred to as an "utterly unconscionable argument" and on page 88, the learned judge said:

" The property expropriated is not envisaged by me, for the purpose of finding its market value, as one whose value has been destroyed by refusal to grant water licenses which, if it were not for the intent to expropriate, would have been granted readily. It would be a sad thing if the government could, having decided to expropriate a commercial undertaking, drive down its price by refusing to allow to it facilities which would be given almost as of right to another utility."

In Alberta, the same principle was applied in the unreported case of McKee v The Queen (Supreme Court of Alberta, Trial Division, J.D.E. No. 51315, Jan. 27, 1967). That case dealt with the effect on compensation in an expropriation where earlier, the area had been declared a public works area pursuant to ss. 25-30 of The Public Works Act. Milvain J., as he then was, referred to the Cunard case and the Nanaimo-Duncan case and decided that the expropriated land should be valued as if the order had not been made. At page 6 of his Reasons for Judgment he said:

" when land has been given an artificial depreciation in value by a public authority which intends to take it over no court, in fixing compensation, is bound immutably to that artificially decreased value, brought about by the authority which in fact is now doing the expropriation. If such were the case it would mean that, in law, the public authority which can move, as was done in this case, to freeze property for a purpose could in effect at that moment expropriate the property to its own use but not pay the owner for it until some future time when it sees fit to actually expropriate; and to do so on the basis of the depressed value, the factual act of expropriation through the freezing had given the property.

I am therefore of the view that in measuring compensation as I must do, at this stage, I must measure the value of the property to a prudent owner as of the date of expropriation, in this instance the 14th of December, 1966, assuming to the property the normal natural propensities it would have had were the freeze order not in existence."

In re Jasper Place and Sawyer, an earlier decision of

this Board, No. 26276 dated September 6, 1963, the Board gave effect to the same principle in a case where the Town of Jasper Place, before it was annexed to the City of Edmonton, expropriated a residential lot for a roadway. The evidence was that, except for the expropriation, the land had some potential for a commercial use if marshalled with adjoining property. The land was not zoned for commercial use at the time but its location indicated that a rezoning application would have a good chance of succeeding if the Town had not required the property for the roadway. The Town argued that as the Town had decided as early as 1954 that it required the property, no one would be interested in purchasing it and the value should be reduced accordingly. On page 5 of the decision the board said:

"The board has no hesitation in rejecting such a contention. The value must be fixed as if the scheme under which the compulsory powers are exercised did not exist."

On page 6 the board said:

" The board considers that there was no chance of getting the Applicant to zone the property commercial due to the fact that it required this property for a roadway. However, as indicated above, the board does not think that this should have the effect of decreasing the value of the potential in determining the amount to be paid by the Applicant."

There are, however, cases where the exercise of powers by the expropriating authority which decreases the value of the expropriated lands are not related to the expropriation. In such cases it appears that the principle of ignoring the decrease in value does not apply.

In Edmonton v Hicks (1963) 39 D.L.R. (2nd) 55, a decision of this Board was appealed to the Appellate Division in a case where the City of Edmonton had expropriated 14 acres of land which had been subject to restricted zoning for parkland and community recreational purposes since 1933. The Board's award was based on a valuation according to the restrictive

zoning. Kane J.A., who gave judgment for the court, said:

"The land being under interim development control could not be developed for other than a use permitted under 'Metropolitan Recreational Zone'. Since 1933 the area in which the land lies has been considered as parkland suitable for parkland and community recreational purposes. This is apparent from the 1933 zoning by-law, the Interim Development By-law of 1950, the Preliminary District Plan adopted in January, 1958, and the Preliminary District Plan adopted in 1961. After the passage of so many years and with no evidence of any suggestion of any change in the designation of the area within which the appellants' land is situate, the possibility that there might be a change in the use of the land to residential is so remote as to be negligible."

In another case, Northwestern Utilities v Timm et al (1964) 47 W.W.R. page 415 there was a consolidated appeal taken to the Appellate Division from awards of this Board in an expropriation by Northwestern Utilities, Limited; the County of Strathcona No. 20 and other municipalities for the purposes of a water line and a gas distribution line. In one of the awards, the Board, in determining the value of the expropriated land, came to the conclusion that one of the parcels could not be sold by itself because of its location adjacent to a main highway. Planning regulations in force at that time (passed by the Province) required that when land is adjacent to a main or secondary highway, there should be provided a service road running parallel with and adjacent to the highway along the entire frontage of land. As the land taken for the pipe line right-of-way corresponded to the right-of-way of the service road which would have to be reserved in the event of a subdivision, the Board held there was no industrial or commercial potential and valued the land for agricultural purposes.

It was argued on appeal that the Board erred in failing to consider the possible changes or rescission of such regulations. On page 419, Macdonald, J.A., who gave the

majority judgment of the court, referred to the following statement of Johnson J.A. in delivering the judgment of the Appellate Division in Calgary Power Ltd. v Danchuk and Day and Big Lake Farming Co. (1963) 41 W.W.R. 124, when discussing future changes in zoning at page 127:

"Nor is the possibility that at some time in the future changes in zoning will permit other methods of subdivision to be ignored. That such possibilities play a part in arriving at the present value is clear from the decisions "

Macdonald J.A. then said:

" The record of the proceedings does not indicate that the board considered that the regulations respecting service roads may be modified. However, public safety must ever be an important factor in the determination of whether service roads should be located along main highways

I think that it is a reasonable assumption to make that if, in the future, the lands in question should be subdivided, a service road would be required for public safety. I am then of the opinion that the board was correct in reaching the conclusion that the lands included in the easement would be lands that would form a service road should the lands in question ever be subdivided."

In that case the regulations referred to were passed under provincial legislation not connected with the expropriation.

Then in Kramer v Wascana Centre Authority (1967) S.C.R. 237, an appeal was taken to the Supreme Court of Canada with the following facts: The appellants held interests in land totalling 86.15 acres in the City of Regina which were governed by a general subdivision by-law which permitted use of the land for single detached dwellings. Later amendments permitted a limited amount of local business uses. The appellants were engaged in plans to develop the area and negotiated with municipal authorities for approval of a subdivision plan for high density residential development; small businesses; office and institutional development; and a shopping mall. The proposed development

was approved in principle by the City Council on October 25, 1959 but no amending by-laws were passed to give effect to the proposal. Instead, as the result of a comprehensive study of the entire City of Regina, a by-law was enacted on December 5, 1961 which adopted a scheme in which the land in question was designated to be used for "parks and public open spaces". That by-law was followed on December 28, 1962 by a zoning by-law which repealed the earlier zoning by-law under which the land was to be used for single detached dwellings and local business use. The new zoning by-law provided that the land would be designated for "public service."

The appellants were served notice of the expropriation of their lands on September 18, 1962. The arbitrator fixed compensation upon the basis of use for "parks and public open spaces." This award was appealed to the Court of Appeal of Saskatchewan where the award was increased. Two of the members of the Court (the majority) said that the value must be determined on the basis of "public service use" according to the December 28, 1962 by-law which they considered in effect at the time of expropriation. The other member of the Court took the view that for the purpose of finding the value of the expropriated lands the December 28, 1962 by-law and the preceding December 5, 1961 by-law establishing the use of the land for "parks and open spaces", should be ignored, and that, for the purposes of determining compensation the land should be valued on the basis of use permitted by the earlier repealed by-law for single detached dwellings and its amendments, which permitted local business use. To this value he added extra value for the possibility of development in accordance with the outline plan which had been approved by the city authorities

before the new zoning by-laws were passed. All the members of the Court, for different reasons, agreed that the award should be increased to \$669,840.00. The appellants appealed to the Supreme Court to have the award further increased.

The judgment of the majority of the Supreme Court was delivered by Abbott J., who, on page 239 said:

" The learned arbitrator found that the Community Planning Scheme adopted by by-law 3506, passed by the City Council of Regina on December 5, 1961, represented the state of mind of the city authorities at that time.

That Planning Scheme was crystallized in the zoning by-law 3618 adopted on Dec. 28, 1962, of which public notice had been given some months before, and which affected the whole City of Regina. The arbitrator held on the evidence that this by-law was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings - although passed of course with knowledge of the Wascana Centre Scheme. He held therefore that the by-law 3618, in limiting the use of the land expropriated to 'public service use' was a determining factor in assessing the amount of compensation. These findings were confirmed by the majority in the Court of Appeal. The Appellants failed to satisfy me that they are wrong and I would therefore dispose of the appeal as proposed by my brother Spence."

The question as to whether the exercise of a power by an expropriating authority which decreases the value of land it later expropriates is or is not part of the expropriation scheme is, in the Board's view, a question of fact. From a review of the cases, it appears to the Board that it is not a difficult task to make such a finding where the evidence clearly establishes, by intention or inference, that the exercise of the power is to assist in the acquisition of land by expropriation. The task is made easier where the exercise of the power is apparently directed at or applies to a particular piece of property or area which is the subject of the expropriation. Difficulties may however be encountered where the exercise of a power affects other land besides the expropriated land and applies generally to a district

involving many parcels.

The judgment of the Supreme Court of Canada in the Kramer case indicates that a general zoning by-law which applies to an entire municipality is not to be considered as part of an expropriation scheme. In the Kramer case, the zoning by-law was passed by the City of Regina, whereas the land was expropriated by the Wascana Centre Authority, which was created under an Act of the Legislature which provided for three participating parties: the city; the province; and the university. By comparison, in the McKee case, the "freeze" order issued by the province under The Public Works Act applied only to that part of the City of Edmonton where the University of Alberta wished to expand. Although the "freeze" order and the subsequent expropriation were actions taken on behalf of the university, both steps were performed by the Province of Alberta and Milvain J. found that the zoning restriction was part of the scheme to expropriate for the purposes of university expansion.

* * * * *

In this application, the Board does not have to consider the effect of an existing by-law or order which has the effect of depressing the value of expropriated land. What the Board has to decide is how the potential uses of the parcel which might have been allowed, except for the expropriation, on a future application for development are to be considered. Any application for development would require the passing of a by-law for the appropriate zoning. Such a by-law has not been passed. The future uses to which a piece of undeveloped land could have been put, if the land had not been expropriated, are a proper consideration in determining the potential value of land as one of the elements in determining value to the owner. In this case the

potential value of the expropriated parcel has been depressed - not by an order, by-law or policy - but as a result of a planning recommendation.

The zoning of the expropriated parcel at June 16, 1970, the date of expropriation, was D.C. This designation refers to one of the schedules of land uses contained in the Land Use Classification Guide and Schedule of Permitted Land Uses adopted by the Council of the City of Calgary in conjunction with Development Control by-law No. 7839, passed on March 16, 1970. The "Use Table for 'DC' - Direct Control District" contains two parts entitled "Specified Uses" and "Permitted Uses". The uses under the first heading are for farms of not less than 20 acres in area. The uses under the second heading are as follows:

"Permitted Uses

All other uses as approved by the Planning Commission on the merits of each individual application having regard to:

- (a) conformity of the proposed use with the general plan being prepared for the City,
- (b) the existing use of the land and existing uses of neighbouring lands, and
- (c) the use to which the neighbouring lands and, where the land has been annexed to the City the previous zoning and development policy and regulations applied to the land before annexation."

The City argues that under this zoning, a high density residential development is not allowed, and the zoning would have to be changed by City Council before such a development could take place. The Board is satisfied that this is correct. The Interfaith project on the west half of the property was preceded by an application to City Council for appropriate zoning and there is no reason to suppose that a similar project on the expropriated portion would not have to meet the same requirements. There was some evidence to the effect that high density residential developments had been constructed with D.C. zoning and this may well be the case. However, it is clear that such developments

obtained the required density approval from City Council and the actual zoning classification was the decision of Council. The Board has considered the provisions of The Planning Act and, without referring to any particular provision, it is beyond question that the Council of a municipality has power to pass by-laws respecting the zoning of land within the municipality. The question the Board has to determine, however, is, in all the circumstances, whether the expropriated parcel is to be valued according to a potential for high density residential use or not.

The City takes the position that, under the allowed density for the entire Dover West subdivision, the highest and best potential residential use the expropriated parcel had, if it had not been expropriated, was for a density of 25 persons or 6.58 housing units per acre. As the Board understands this argument, this refers to the densities which were recommended by the Calgary Planning Commission as part of its work in planning the Dover West subdivision.

When he was discussing Exhibit 8, in which the Planning Commission recommended a density of 15.3 dwelling units per acre for the Interfaith development on the west part of their property, Mr. Facey described the method used by the Commission for recommending densities at page 68 of the transcript. He said:

" The plan on Exhibit 7 has the northeast corner shown blank. The 26 acres approximately in the north, shown as two parcels, one labelled 11.3 acres of community reserve and the other labelled B. 57.3 persons per acre, and that is 12.6 acres. Then, has the balance of the Dover-West Subdivision marked A, and the balance of the area over which densities will be calculated that is extending the area between 26th and 34th Avenues westward of the Barlow Trail, marked D. The significance of this plan is that it is the follow-up to Exhibit 3 Plan, whereby the density situation was analyzed. Now we have a policy or rule in the City that densities in any defined area shall not exceed 22 persons per acre. There are a number of reasons for this figure which I can show you if you desire. "

"Q. Could you go through them briefly, what the limitations are, the 22 people?

A. Yes. We have to have some design figure to work for in providing engineering, utilities, water, sewer, storm. This figure has been chosen for this purpose. We get under the Subdivision Transfer Regulations, 10% of any subdivision for community reserve if one analyzes the school children generation from an area which has 22 persons per acre, translate this into land requirements for schools by the Separate and Public School Boards, excluding senior high schools, and also for small ornamental parks etcetera, which are required within a subdivision, this land requirement equates to 10% of the area you are working, over which you are working, provided you average 22 persons per acre. So it is a convenient figure which we have used for some years now, which is the design, optimum design criteria."

Referring to the recommendation for densities in the Dover West subdivision again at page 69, he said:

"Now, taking 22 persons per acre over this area which is defined by the major street of 34th - - I am sorry, the major street of 36th Street, the major Avenue 34th, Barlow Trail, and the south extremity of the existing residential development, 26th Avenue and apply 22 persons per acre over this; applying the densities that have been achieved in Dover West, using a few duplex houses, but primarily single-family - - allocating single-family densities to the Area D, allocating to the 12.6 acres marked B, the Interfaith Development, 57.3 persons per acre, that is the figure that they produced in their application to us for development, you are left with a balance of population which amounts to 660 people, which is accommodated on Parcel C at 44 persons per acre over the 15 acres. Parcel C is the northeast corner."

On page 70, still discussing Exhibit 8 he said:

"This, the Planning Commission minute of October 29th was for consideration of so-called densities in the area, and it was the decision - - it starts off by saying 'On the proviso that the City purchases the park area, the Commission recommends,' and the recommendation is to the City Council that the densities of the area are as I have just described and these are set out in the subsequent conditions. Then it gives the people count to be used for different types of dwelling units and makes recommendation that the plan be presented to Council for approval."

After discussing the densities recommended by the Commission for each area of the whole Dover West subdivision, he ended by saying that out of a total density allocation of 660 people for the entire subdivision, 416 people were

committed leaving 244 presently uncommitted. This figure corresponds roughly with the City's argument that if the park site had not been expropriated, the highest and best use of the site under the zoning would be for residential development of 25 persons per acre.

The densities which have been described were recommended by the Calgary Planning Commission on October 29th, 1969 on the application of the City Planning Department for a revision of a portion of the outline plan of the subdivision of West Dover. The minute of the Commission's recommendation and the attached plan, which was previously mentioned, comprise Exhibit 8. In the Board's view, Exhibit 8 is the key exhibit in these proceedings as it was here that the Calgary Planning Commission designed the various densities for the whole subdivision. It is manifestly clear that the densities were arranged with the overall density of 22 persons per acre as Mr. Facey testified and, it is important to note, that the acquisition of the park site was also uppermost in their minds. The minute portion of Exhibit 8 is set out in its entirety as follows:

"COPY SENT ON Nov. 7 1969
TO

I hereby certify that the
within is a copy of an original
document of record in this
office

(SIGNED) M. ROGERS

Secretary
Calgary Planning Commission

13. THIS ITEM IS CONFIDENTIAL AND NOT FOR PUBLICATION.

Application by the City Planning Department, for consideration of a revised outline plan of subdivision for portion of West Dover. (S.½ Section 9-24-29/4).

C.P.C. October 29th, 1969 (68-Y-218/9E)

The addition of 12 acres for park, is cause for consideration of the overall density of the entire area bounded by 26th Avenue to the north, 34th Avenue to the south, 36th Street to the east and the proposed Barlow Trail to the west.

"Decision: On the proviso that the City purchases the park area, the Commission recommended:

- (a) that the density of the area (boundaries noted above) be not greater than 22 person per gross acre for a total population of 4,535 persons;
- (b) that the 'Interfaith' project adjacent to 26th Street S.E. be permitted to develop to a density of 15.3 dwelling units per acre (57.3 persons per acre) for a total of 192 units over a site of 12.6 acres;
- (c) that those properties previously omitted from approval adjacent to 36th Street be permitted to develop to a density of 11.6 dwelling units per acre (44 persons per net acre);
- (d) that those lands west of the extension of 33rd Street S.E., of which no outline plan has been prepared to date, be limited to a density allowing single-family housing only; and
- (e) that the plan be presented to Council for approval.

Note: The count of persons is based upon the following factors:

Single-family unit	4 persons per dwelling unit
Two-family dwelling unit-	3.5 persons per dwelling unit
Multiple-housing	
1 bedroom unit	- 1.8 persons per dwelling unit
2 bedroom unit	- 3.5 persons per dwelling unit
3 bedroom unit	- 4.1 persons per dwelling unit
4 bedroom unit	- 5.0 persons per dwelling unit

The following is a hand-written note at the bottom of the Exhibit:

"N.B. *

Commissioner Hamilton does not want this to go to council until the park & hence densities have been resolved.

(unidentified signature)

It is appreciated that densities are not finally decided by the Planning Commission as this is a function of City Council; the Commission acts only to recommend in this regard. But the Board is satisfied that in an application to develop property in the area, City Council's decision would be influenced not only by the outline plan

but also by the recommendations of the Commission regarding densities. This state of affairs, in the Board's view, forms the basis of the position taken by the City with respect to the potential use of the expropriated parcel.

It is obvious, from the clear language in the Commission's minute, Exhibit 8, that the densities which it chose to recommend for the entire subdivision were chosen with the acquisition of the parcel expropriated by the City in mind. In the Board's view, it follows that if the Commission had not had to provide for a park site, the densities recommended for what is now the park site and the other areas could have been somewhat different.

In these circumstances, it is the Board's view that if the Calgary Planning Commission's recommendation contained in its minute of October 29, 1969 was adopted by the City Council and a by-law passed, there would be no difficulty in finding that such a by-law was part of the expropriation scheme and the Board could ignore the by-law in determining the potential value of the property. If this was the situation, the facts of the case would be quite similar to the facts in some of the cases which have been referred to. But in this case, the expropriating authority, the City, has not in fact passed a by-law or order which could be said to have adversely affected the value of the Interfaith property. No application for rezoning the parcel for any kind of development had been made up to the time of the expropriation.

However, as the Board understands the principles which have been laid down by the courts, what has to be decided is whether any steps have been taken prior to the date of expropriation which depressed the value of the expropriated land and which, under the circumstances, could be considered as part of the expropriation scheme. In most of the cases the Board has reviewed the action taken which was found to

be part of the expropriation scheme was the result of the exercise of a power by the expropriating authority. In the Nanaimo-Duncan case, the expropriation was by the British Columbia Power Commission but the policy which the Court considered to be part of the expropriation scheme was a policy of the government of that province. The Court found that the policy and the act of expropriation were part of the scheme although they were powers exercised by two separate authorities.

In the case now before the Board the expropriation results from an expropriation by-law passed by the City. What has affected the potential value of the land taken, however, stems from what was done by the Calgary Planning Commission. In the Board's view the Commission is not a separate entity from the City but is merely a body, established by a by-law of the City, to perform certain functions as part of the City's planning. (The Planning Act, section 15). Its functions are, according to subsection (4) of that section, to:

- "(a) advise and assist the council and co-ordinate the activities of the various departments and agencies of the municipality with regard to the planning of orderly and economical development within the municipality, and
- (b) advise a subdivision approving authority with respect to a proposed subdivision where the land is situated within or near the boundary of the municipality."

The power to approve subdivisions is given to the Planning Commission by section 19 of The Planning Act. As a mere agency of the City, with co-ordinating and advisory functions with respect to planning matters, the Board considers that what was done by the Planning Commission in recommending densities in the Dover West subdivision in Exhibit 8 was in fact an act of the City in exercising one of its many powers with respect to planning. As the

Board has said it is satisfied that the council of the City would be influenced by the Commission's recommendations in any application that was made for a specific development in a subdivision.

What must now be considered is whether the recommendation of densities in Exhibit 8 can fairly be considered part of the scheme to expropriate the Interfaith land. This is a question of fact which must be determined from the circumstances.

Reviewing the facts briefly, it seems to the Board that when Interfaith first approached the City about a project to alleviate the housing shortage which existed at that time, the City (the planning and land departments) were in favour of the idea and assisted Interfaith to acquire land in a district which the City was in the process of planning and in which the City itself was going to provide for a high density development. The City continued to be in favour of the Interfaith project throughout part of 1969 and this is indicated when the City (the Planning Commission) approved the subdivision plan on June 11, 1969. On this plan, Exhibit 4, the entire Interfaith site is designated as "Proposed Multiple Family." At this point, planning had not advanced to the stage where density studies had been completed, but the Board is satisfied that the designation at least reveals what the City was thinking about that part of the subdivision at that time.

The actual density recommendation was made by the Commission on October 29, 1969 in Exhibit 8 at the time when it was known that the park site would be required and during the period when the City was negotiating with Interfaith for the east half of their property for the park site.

As the Board has previously discussed, the allocation of recommended densities for the parts of the Dover West subdivision, based on a general policy to average 22 persons per acre, were chosen with the provision of the park in mind. It was at this point that the City indicated its change in thinking about the potential use of the expropriated parcel. It follows that if provision for a park had not been in the minds of the City, (Planning Commission) the recommended densities could have been so allocated that the general policy average of 22 persons per acre could have been adhered to while providing for a higher density for the whole Interfaith site and, by providing for lesser densities in the other undeveloped areas of the subdivision.

It is correct, of course, that Exhibit 8 recommends densities for the whole subdivision as well as for the expropriated parcel. But, in the Board's view there is no similarity between the facts of the Kramer case and the circumstances in this case. In the Kramer case it was found that a general zoning by-law which applied to the entire City of Regina could not be considered as part of an expropriation scheme. In the present application the density recommendation affected only one small subdivision of the City of Calgary.

The Board is satisfied that the density recommendation which the City says would have restricted the potential use of the expropriated parcel was designed for the purpose of providing for the acquisition of the parcel for the park site by the City and as such must be considered as part of the scheme to expropriate. The Board is also satisfied that if the matter of a park had not arisen, it was the intention of the City, through its various planning

officials, to design the Dover West subdivision in such a way that most of the northern part of the subdivision would be used for high density residential development. The Board has come to this conclusion for two reasons; first the assistance and encouragement which the City gave to Interfaith up until the time it became known that a park was required leaves no doubt in the Board's mind that the City was interested in the development of the whole of the Interfaith property for residential purposes; and secondly, the City itself was involved in a tri-party scheme with the Federal and Provincial governments for the development of a high density experimental housing scheme with which the development plans of Interfaith were compatible. This experimental housing scheme, is located in a 15 acre parcel immediately to the east of the expropriated parcel and is designated on the plan forming part of Exhibit 8 as block C, "44 persons per acre."

Experimental housing schemes are provided for under section 155 of The Planning Act. It is not necessary to quote the various provisions in the section for the purposes of this decision, but the section provides for a municipality to apply to the Minister for an order designating an area or areas within its boundaries to be a Residential Experimental Development Area. The section applies where the Government of Canada provides financing in whole or in part for encouraging the development of low cost housing on an experimental basis. The details of the experimental housing scheme adjacent to the expropriated parcel are not known to the Board.

The inference the Board has drawn is that the City intended the Interfaith site and the adjacent experimental

housing scheme to provide badly needed land for low cost housing and that this intention would have been reflected in the density recommendations for the expropriated parcel if the need for a park had not arisen.

Interfaith submits in effect that the expropriated parcel should be valued on the date of expropriation as possessing an immediate potential for development to the same level of residential density as the completed housing project on the west portion of the original parcel it purchased for that purpose. In view of the Board's findings that, except for the intervention of the park, it was intended that the whole Interfaith parcel and the adjacent experimental housing project would provide needed low cost high density housing, the Board is inclined to agree with this contention. However, the Board does not consider that compensation should be determined by arriving at a price per acre for land having such potential value and multiplying that by 11.72 acres, the area of the expropriated parcel.

It was mentioned earlier that the question of a reserve in respect to the Interfaith subdivision west of the expropriated parcel has not been resolved and the payment which the City has decided that Interfaith must make in lieu of lands awaits the compensation award of this decision. The details of the considerations of the Planning Commission on this matter have been set out and are contained in Exhibit 9. Consideration must be given to sections 25 and 26 of The Planning Act, and the Subdivision and Transfer Regulation made thereunder. Alberta Regulation 215/67 and amendments thereto contains provisions that an owner of land comprising a proposed subdivision is required to provide from the land such portions as may be required by the Act and the

Regulation for roads, public utility parcels and reserves. Under paragraph (r) of section 2 of the Act, "'reserve' means a parcel of land reserved for use as a park, recreation area or a school site." In considering what would have been the situation without the expropriation, the Board must bear in mind that the decision to accept money in lieu of reserve in the Interfaith project and the density established for the experimental housing project in Exhibit 8, were both matters that were decided in contemplation of a park of about 12 acres.

In other words, for the purposes of valuing the expropriated parcel, it is the Board's view that if the effect of the expropriation scheme on the land is to be ignored, Interfaith cannot obtain the benefit of the scheme by having the entire acreage of the parcel valued as if no road, public utility parcels or reserves would be required. Had there been no expropriation, it seems reasonable that not only would the density recommendations of the subdivision have been different to provide for full development of the whole of the Interfaith property, but the design of that part of the subdivision which was intended for low cost housing would have been modified to allow for the road, utilities and parks or recreational areas which good planning would require.

What the actual net acreage of the expropriated parcel that would have been available for development would amount to is a matter of conjecture. Some evidence was adduced by the City on this question but the Board does not consider that the views of officials who gave opinions on the question furnish a reliable guide in the circumstances. The Board will, however, take this into account in fixing compensation.

The City's appraiser, Mr. Klaasen, prepared a report in which he came to the conclusion that the market value of the expropriated parcel as of February 9, 1970, about four months preceding the expropriation, was \$3,900.00 per acre. This estimate of value is of little assistance to the Board as it was predicated on the position taken by the City that the parcel had a potential for development for residential purposes of not more than 6.58 units per acre. Evidence was also tendered of purchases of land made by the City in the subdivision. The Board does not consider in this case that evidence of land sales to an expropriating authority provides a good indication of value.

In his appraisal report, Mr. Rowbotham, Interfaith's appraiser, valued the expropriated parcel on the basis that the property was zoned R-3. This designation refers to Appendix 8 of Exhibit 14, the development control by-law. The specified uses include ~~apartment~~ houses as well as one and two family dwellings. Under this classification, specified uses for transitional sites include various institutional developments such as colleges, homes for the aged and hospitals. Mr. Rowbotham was unable to find R-3 zoned land sales in the vicinity of the expropriated land so he selected recent sales in different parts of the City, some of which were several miles distant from the expropriated parcel. As would be expected, the selling prices of these properties on a per acre basis varied over a wide range. The sales which Mr. Rowbotham considered were most comparable are located in different districts in the City and vary in price from about \$12,500.00 per acre, or 28.5¢ per square foot, to \$26,500.00 per acre, or 61¢ per square foot. The Board does not

consider that any of these sales are comparable to the expropriated property and the Board did not look at any of these parcels at the time the Interfaith site was viewed.

Mr. Rowbotham also referred to three parcels which are located close to the Interfaith land but none of these, in the Board's view, furnish satisfactory evidence of value. None of the parcels had been sold and evidence of offers, options and refusal prices is not reliable. Mr. Rowbotham concluded that the expropriated parcel was worth \$91,737.36 or \$7,840.80 per acre. The Board is satisfied that this valuation is a judgment figure which has been arrived at by Mr. Rowbotham after considering the prices paid for land in R-3 zoned districts throughout the City.

Counsel for Interfaith submits that the value of \$7,840.80 per acre suggested by Interfaith's appraiser is modest and he argues that the best indication of value of the expropriated parcel is to be obtained from the sale of a parcel which is now part of the adjacent experimental housing site. The parcel was formerly subdivided into small lots under an early plan of the area, 383 A.C., and is designated on the Exhibit 8 plan as Block 10. The exact area of Block 10 is not known but it was calculated by one of the City's witnesses as containing about 2.83 acres. Exhibit 24, a copy of a real estate listing of Block 10, indicates the area to be 3 acres.

Block 10 was sold in 1970 for the sum of \$36,850.00 paid in cash. The sale is evidenced by two documents, which were entered as Exhibits 25 and 26. Exhibit 25 is a certified copy of the transfer which is dated August 26, 1970, after the date of expropriation. Exhibit 26 is a

photocopy of an option to purchase Block 10 and the amount of the offer and the names of the parties corresponds with the consideration and the parties on the transfer. The date of the option and its acceptance by the owner, is the same - April 17, 1970 - two months preceding the expropriation.

The City objected to the admission of Exhibit 25 on the grounds that the sale took place after the expropriation and, on the authority of the decision of the Supreme Court of Canada in *Roberts and Bagwell v R.* (1957) S.C.R. 28, the sale was inadmissible. The statement in the decision to which counsel referred is at page 36 where Nojan J. said:

" In my view, evidence of a sale after the enactment can, in the absence of special circumstances, be relevant to the value prior to the enactment. The sale must be shown to be as free in all respects from extraneous factors such as prior sales and made within such time as the evidence shows prices not to have changed materially from those before the critical date. In other words, the mere circumstances of sale being before or after a particular date cannot nullify the relevance of subsequent sales while the general market conditions have remained the same. The rule should allow the Court to admit evidence of such sales as it finds, in place, time and circumstances, to be logically probative of the fact to be found."

The option ran from the date of acceptance, April 17, 1970 and was exercisable during a period of ninety days, but no evidence was called to show when the option was actually exercised. The Board agrees with Interfaith's argument that the transfer is only evidence of the completion of the sale and the actual sale date would have been at an earlier date. In the absence of clear evidence of the date of the sale of Block 10, there are no grounds for excluding admission of the transfer. The weight to be given to this sale however, is another matter. No witnesses were called to prove the date of the sale or to

give the circumstances of the sale and the Board is not inclined to accept the sale of Block 10 as a reliable guide to the value of the expropriated parcel.

After carefully considering all the evidence and having considered the arguments of counsel, the Board has concluded that the value of the expropriated parcel cannot be determined on the basis of a price per acre or on a square footage basis. Furthermore, the Board is of the view that none of the sales of parcels used as a basis of comparison provide a sufficiently good indication of value upon which the Board can rely in determining the amount of compensation.

Taking all factors into account the Board has come to the conclusion that the value of the property to Interfaith at the time it was expropriated was \$90,000.00.

Concurrently with this decision the Board will issue its order fixing compensation in the amount of \$90,000.00. In addition the City shall pay Interfaith interest at the rate of seven (7%) per centum per annum on the sum of \$90,000.00 from June 16, 1970 until paid taking into account an amount of \$32,551.50 advanced to Interfaith by the City on November 5, 1970.

On the matter of costs the Board will order that each party bears its own costs and in addition shall bear equally any costs which may have been incurred by the Board.

DATED AT EDMONTON, in the Province of Alberta, this 24th day of November, 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) W. D. ABERCROMBIE

MEMBER

Certified a true copy,

Secretary.



IN THE MATTER OF "The Municipal Government Act":

AND IN THE MATTER OF "The Expropriation Procedure Act":

AND IN THE MATTER OF an application to the Public Utilities Board by the City of Calgary for an order fixing the compensation to be paid to the owners of certain lands in Subdivision Plan Calgary 5589 A.D.:

BETWEEN:

THE CITY OF CALGARY

Applicant

- and -

CECIL FRANCIS CARTER and
THOMAS P. CAHOON

Respondents

APPEARANCES:

R. B. H. Rondeau, Esq.	:	For the City of Calgary
	:	
F. J. Fleming, Esq., Q.C.	:	For Cecil Francis Carter
	:	and Thomas P. Cahoon

D E C I S I O N

This is an application by the City of Calgary (hereinafter referred to as "the City") to the Public Utilities Board for an order fixing the amount of compensation payable to the owners for lands which the City has expropriated pursuant to the provisions of The Expropriation Procedure Act, chapter 130, R.S.A. 1970.

The lands taken were owned by Cecil Francis Carter and Thomas P. Cahoon, each having an undivided one-half interest therein, and consisted of:

Lots 1 to 20 inclusive, in Block 37, Plan Calgary 5589 A. D.; excepting out of Lots 1 to 8 inclusive all mines and minerals.

It has been agreed by the parties that the effective date of taking for the purpose of determining the compensation is April 1, 1971.

The lots lie in the north-eastern part of the City in Section 26, Township 24, Range 1, West of the 5th Meridian, in the Province of Alberta. The subdivision plan in which the lots are located was designed many years ago as a residential subdivision, apparently in or around 1910. The subdivision has never been developed and the streets and lanes depicted on the plan were never physically constructed.

Generally the lots lie east of a residential subdivision known as Vista Heights. The boundaries of this subdivision are:

West boundary	15th Street N.E.
East boundary	19th Street N.E.
North boundary	24th Avenue N.E.
South boundary	17th Avenue N.E.

all in Section 25, Township 24, Range 1,
West of the 5th Meridian.

Nose Creek, which meanders through the north-eastern part of the City finally emptying into the Bow River, lies to the west of the subject lots. A railway right-of-way, on which is located the Canadian Pacific Railway line to Edmonton, also lies west of the subject lots, such right-of-way running generally north and south on the east side of Nose Creek in that part of the North East Quarter of Section 26 in which the subject lots are located.

North of the subject lots, partly in Sections 1 and 2, Township 25, Range 1, West of the 5th Meridian, the McCall Field is located. This airfield, extending over a large area in the north-east part of the City, provides general airport facilities for air traffic into and out of the City, including continental and intercontinental flights.

Trans-Canada Highway No. 1, which runs east and west through the City along 16th Avenue North, lies south of the subject lots.

More specifically the subject property consists of twenty lots each having a frontage of 25' and a depth of 118', municipally located, according to Subdivision Plan 5598 A.D.

filed with the application to the Board by the City and entered in these proceedings as Exhibit 6, on 26th Avenue N.E., on which they front, which runs along the south boundary of the North East Quarter of Section 26, Township 24, Range 1, West of the 5th Meridian, between 14th Street N.E. on the west side, on which Lot 1 flanks, and 15th Street N.E. on the east side, on which Lot 20 flanks. The total area of the lots amounts to 59,000 square feet or approximately 1.35 acres. The improvements on this parcel of land consisted of a small older type house in a good state of repair having dimensions which provided an area in the order of 550 to 650 square feet. In addition to the house there were three out-buildings said to be in a rundown condition. The house was being rented and was served with electric utility service and connected to a sanitary sewer line running past the property, which line serviced the Vista Heights Subdivision to the east. Water service was provided through the use of a well located on the property and heat was provided by means of propane.

The lots are located in an area of the City which, pursuant to a resolution adopted by the City council on March 16, 1970, being a resolution adopting a Land Use Classification Guide and a Schedule of Permitted Land Uses, is zoned as Class "A" Use. Lands under this classification have reference to "Agricultural and Parkway Districts". The uses allowed under this classification set out in Appendix 2 of the resolution are as follows:

<u>Specified Uses</u>	<u>Permitted Uses</u>
Farms of no less than 20 acres area	Airports and airfields
Identification signs	Animal hospitals, kennels and pounds
Local advertising	Archery ranges
One-family dwellings on sites of no less than 20 acres area	Bowling greens
Parks	Cemeteries

Specified Uses

Private garages

Water reservoirs, wells,
storage, purification and
distribution systems

Permitted Uses

Christmas tree sales

Colleges on sites of no less
than 20 acres area

Convents and monasteries on
sites of no less than 20 acres
area

Correction homes on sites of
no less than 20 acres area

Crematories

Directional signs

Domestic animal and poultry
raising for commercial
marketing

Drive-in theatres

Golf driving ranges

Exhibition grounds

Fire stations

Golf courses

Permitted Uses

Gun clubs

Home occupations

Home for the aged, widows
or children on sites of no
less than 20 acres area

Horse riding academies

Hospitals and sanatoria

Keeping of pigeons

Kindergartens - posting
mandatory

Market gardens, horticul-
tural nurseries and green
houses

Private clubs and lodges

Private schools
Public schools

Public and quasi-public
buildings

Public utility buildings and
installations

Race tracks, commercial
sportsfields and stadia

Radio and television
transmitting stations, towers
and equipment (commercial)

Radio transmitting stations,
towers and equipment (amateur,
fire, police and taxis)

Sand and gravel pits

Permitted Uses

Nursery schools - posting mandatory

Nursing and convalescent homes on sites of no less than 20 acres area

Petroleum and natural gas wells, drilling, producing and storage equipment

Police stations

Permitted Uses

Small holdings

Sportsfields (non-commercial)

Tennis courts

Zoological gardens and open air museums

"Specified Uses" and "Permitted Uses" have the meaning assigned to such words and phrases under a resolution adopted by the City Council on March 16, 1970, being a resolution adopting "Rules Respecting the Use of Land". Under that resolution the meaning given to the phrases above referred to are:

"'specified use' means a use of land or a building appearing in a use table in the column captioned 'Specified Uses' and includes a use found by the Planning Commission as agent of Council to be similar to a specified use;"

"'permitted use' means a use of land or a building appearing in a use table in the column captioned 'Permitted Uses' and includes a use found by the Planning Commission as agent of Council to be similar to a permitted use;"

Section 3 of the resolution adopting rules respecting the use of lands provides:

" USE OF LAND

3. Subject to the provisions of the City of Calgary Development Control By-law, being By-law No. 7839, and amendments thereto, or any by-law substituted therefor and these Rules Respecting the Use of Land, a person
 - (a) may use a building or land for any use established as a specified use for the district in which the building or land is situated according to The Land Use Classification Guide;
 - (b) may, subject to compliance with such conditions, exceptions or limitations as the Planning Commission may lawfully impose, use a building or land for any use established as a permitted use

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" for the district in which the building or land is situated according to The Land Use Classification Guide;

(c) may use a building or land for an accessory use. "

By-law No. 7839 referred to in section 3 is "The Development and Control By-law" passed by the City Council on March 16, 1970.

* * * * *

Witnesses called by the parties were as follows:

For the City:

Howard P. Hamilton - an Accredited Appraiser and a member of the Appraisal Institute of Canada;

Brian Musgrove - a land buyer employed by the City, engaged to negotiate the purchase and acquisition of lands for the City.

For the Owners:

Don Rollheiser - Owner and Manager of Alberta Business Locators;

John C. Leslie - an Accredited Appraiser and a member of the Appraisal Institute of Canada.

Mr. Hamilton, in his testimony and in his appraisal report (Exhibit 1), stated that most of the lands shown on the subdivision plan had never been developed and that the only access to the property was by proceeding from a point located approximately at the intersection of 13th Street and 32nd Avenue N.E. and proceeding in a southerly direction to the property which is located, as pointed out earlier, on 26th Avenue N.E. between 14th and 15th Streets N.E.

In his report Mr. Hamilton states that "the approach road to the property is in very poor condition and it is really more of a trail than a regular road although it has some built-up surface and gravel". The location of this road has been

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depicted on a plan submitted by Mr. Hamilton and entered as Exhibit 2.

He describes the lots as being reasonably level from the road allowance on the west side of such lots easterly to where the house and out-buildings were located but beyond that point, for a distance of 150' to 200' east, he stated that there was a fairly deep ravine.

In his report, in referring to the highest and best use to which the property could be put, he said:

" In this location and general vicinity there has been little or no activity over the past years to indicate any discernable trend to a more intensive urban use. As noted above the open roads in the area are in generally poor condition and there are only a few buildings scattered throughout the district.

While the zoning category is A- Agricultural it would appear that the location in the Nose Creek valley would some day lend itself to an industrial use but this is considered a long range speculation and it would require the replotting and upgrading of the whole district.

Therefore, for appraisal purposes, it is believed that the location can be considered as offering to real estate purchasers a long range speculative proposition with any buildings on the lands, that can be rented, paying for the costs of holding the properties."

He said sales of comparable property in the area were difficult to find, firstly, because there were very few parcels of land which have been developed with buildings, and secondly, because the City owns much of the land in the area. He, therefore, used as a reference the sales of lands in other areas of the City which he considered were of a nature comparable to that in which the subject property was located, notably the Valleyfield area which lies in the south-east part of the City south of the Forest Lawn District.

The properties located in the Valleyfield area listed by Mr. Hamilton in his report include:

Property D - offered for sale in August 1968 for \$9,700, representing \$8,500 per acre;

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Property E - Sold in July 1969 for \$17,500, representing \$17,000 per acre;

Property F - Sold in February 1970 for \$13,250, representing \$17,400 per acre.

The Generalized Zoning Plan entered as Exhibit 13 indicates the land in the Valleyfield area is classified as "DC" - Direct Control District. Mr. Hamilton, in his testimony described the Valleyfield area as zoned "Agricultural AM" which refers to "AM" - Agricultural (Future Industrial Districts).

The uses to which lands in areas classified "DC" may be put is set out in Appendix 21 of the resolution of the City "Adopting a Land Use Classification Guide" and Schedule of Permitted Land Uses" as follows:

"Specified Uses

Farms of no less than 20 acres in area for which the proposed location, height and size of buildings has been approved by the Planning Commission

Permitted Uses

All other uses as approved by the Planning Commission on the merits of each individual application having regard to:

- (a) conformity of the proposed use with the general plan being prepared for the City
- (b) the existing use of the land and existing uses of neighbouring lands, and
- (c) the use to which the neighboring lands and, where the land has been annexed to the City the previous zoning and development policy and regulations applied to the land before annexation.

The "AM" use, to which Mr. Hamilton refers, is set out under Appendix 20 of the resolution adopting a Land Use Classification Guide and Schedule of Permitted Land Uses which provides:

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<u>"Specified Uses</u>	<u>Permitted Uses</u>	<u>Permitted Uses</u>
Farms of no less than 20 acres in area	Asphalt batching plants Bulk oil storage warehouses	Radio transmitting stations, towers, and equipment (amateur, fire, police and taxis)
Identification signs	Cement block manufacture	
Parks	Cement brick manufacture Concrete batching Core houses Directional signs Garbage, offal, or dead animal reduction or dumping Keeping of pigeons Large scale industries Motels Open air sports arenas Open air storage Petroleum and natural gas wells drilling and producing equipment Pipe storage (petroleum industry) storage yards and buildings Radio and television transmitting stations and equipment (commercial)	Sand and gravel pits Service stations Trailer coach parks (posting mandatory) Truck motels Vehicles and equipment (petroleum industry) storage yards and buildings Water reservoirs, wells, storage, purification and distribution equipment Any other use which in the opinion of the Planning Commission will not hinder the planned development of the area

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In his report Mr. Hamilton comes to the conclusion that the value of the lands as at April 1, 1971 was \$10,500.

* * * * *

Mr. Rollheiser, who is not a qualified appraiser but who has acted for certain developers in assembling lands in the City of Calgary for development purposes, was of the opinion that the lots, which he considered had accessibility from a good all-weather road on the east boundary thereof, would be easily developed as to the west portion thereof and that the easterly portion, with clean fill involved, could also be developed. With respect to zoning, he agreed that while such property was zoned agricultural it should, as he expressed it, "in the future it should be residential with a strong indication of future industrial depending on the utilitarian use and relativism of the current government municipality trends".

* * * * *

Mr. Leslie, in his appraisal report, Exhibit 17, set out the contingent and limiting conditions used in making his appraisal. Included among the conditions which he used is the following:

"The appraisal is made on the assumption that a satisfactory zoning and access have been obtained and that no impediments exist such as to interfere with the highest and best use consideration of the site."

He values the lots on the basis of their being developed into an industrial subdivision using as a basis of valuation the prices being paid for industrial sites in the Burns Industrial Park, which is an area zoned "Industrial" lying east of the Blackfoot Trail and north of 58th Avenue in south east Calgary.

The valuation which he places on the subject lots is

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arrived at by the use of the average price of comparable sites, on an acreage basis, which have been sold in the Burns Industrial Park and by deducting therefrom an amount which he considered would be the cost of a share in the additional utilities required and the cost of replot, taxes, legal and selling costs. On this basis he comes to the conclusion that the subject lots at April 1971 had a value of \$25,000.

* * * * *

Evidence was given by Mr. Musgrove concerning the prices which were being paid by the City for lands in which the subject properties are located. In addition evidence was adduced from this witness, who is not an engineer, as to the estimated cost of placing fill in the area of the subject property in which the ravine is located.

* * * * *

In outlining the general location of the property earlier in this decision the Board referred to its location in relation to the airfield facilities serving the City of Calgary. Reference was made to this by several of the witnesses who testified and there was tendered as Exhibit 11 a brochure entitled "The Protection of Calgary International Airport A Land Use Policy". This brochure, apparently approved by the City Council on August 9, 1971, outlines certain recommendations and restrictions which should be considered with respect to the development of lands influenced by the operations of the airport.

On pp. 10 and 11 of the brochure is a plan with an accompanying table depicting five noise sensitivity zones, I to V inclusive; the Composite Noise Rating (C.N.R.); and the type of land uses recommended for each zone. The table is stated to be reproduced from "the Canadian Air Transport

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Report of December 1970", entitled "Land Use in the Vicinity of Airports". pp. 22-28 No evidence was adduced as to the significance of the noise ratings but the table indicates the ratings used in the table extend from 100 to 115. The plan indicates that lands immediately south of the south end of the north-south runway have a rating of 115 progressively diminishing to 95 as the lands become further removed from the runway. The subject land appears from the plan and from testimony given by Mr. Musgrove to be located in Area II which has a composite noise rating of 100 - 110. In this area the table indicates that "residential development" should be restricted or not permitted but that certain commercial and industrial uses, including warehouses, be permitted.

* * * * *

The basis upon which compensation is to be determined has been considered by the Courts and by this Board on other occasions. In Decision 28096, dated March 22, 1967 in re Calgary Power Ltd. v. Hermitage Construction Ltd. et al the Board in that case was urged to adopt a basis of valuation wherein an appraiser had applied the assumption, in valuing land zoned agricultural, that the area had been zoned residential and actual subdivision had taken place.

In Decision 28096 the Board said:

" In determining the amount of compensation it is the value to the owner and not the value to the taker which must be determined. In re Lucas & Chesterfield Water Board, L.R. (1909) 1 K.B. 16, Fletcher Moulton, L.J. made this statement:

'The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e. that which they are worth to him in money. His property is ... not diminished in amount but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him and not on the value to the purchaser, and hence it has from the first been recognized as an absolute

" 'rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands and any and every element of value which they possess must be taken into consideration insofar as they increase the value to him.'

And in re Board of Education for North York v. Village Developments Ltd. (1956) 3 D.L.R. (2d) 161; ((1956) S.C.R. 539) it was held:

'While the general rule for fixing compensation for expropriated land is to determine its present value to the owner in terms of all its advantages, present and future, which the land possesses, nevertheless it is wrong in determining the value of land, which, admittedly is suited for a subdivision development, to ignore the statutory requirement of approval to any subdivision plan under planning legislation and to fix compensation as if the owner were entitled to proceed to an immediate sale of the land as building lots. Regard must be had to all the eventualities foreseeable or only vaguely foreseeable by which a prudent person, looking forward immediately before the expropriation would be influenced.'

Mr. Caithness throughout his report has proceeded on the assumption that the area has been zoned residential and the actual subdivision has taken place.

In fixing compensation it is proper for the Board to consider the future subdivision potential of the area but it is not proper to proceed upon the basis that the anticipated zoning change has been accomplished and the subdivision plan approved."

The owners argue that the property at the time it was expropriated by the City was usable without restriction for industrial purposes. In the Board's view this contention must be rejected. The evidence is that the area in which the lands were located was designated Class "A" under The Land Use Classification Guide adopted by the City under which classification specified uses do not include "industrial uses".

It will be recalled that Mr. Leslie in his appraisal

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used the assumption that "satisfactory zoning and access had been obtained". This was the basis he used in arriving at his estimate of value of the subject lots as an industrial site.

The Board, as it did in the Hermitage case, rejects this basis and accordingly Mr. Leslie's valuation must be rejected.

Mr. Rollheiser, who was not qualified as an expert witness, was nevertheless permitted to file a report which he had prepared, Exhibit 9. In this report he priced the subject lots on a developed lot basis which, even had he been qualified to give opinion evidence, would have had to be rejected for the same reason as the Leslie opinion is rejected.

This leaves for consideration the valuation by Mr. Hamilton. The Board has referred to the narrative in Mr. Hamilton's report as to the highest and best use of the property. This narrative indicates that it had some potential for future development as an industrial site.

In arriving at his valuation of the property Mr. Hamilton refers to four actual sales, one of which, at 1409 - 27 Ave. N.E., was sold to the City in 1968. The other three sales listed in his report are for properties located in Valleyfield. All have residential development on them and are subject to restrictive zoning.

The Board is not convinced that the prices being paid for developed residential property in the Valleyfield area are of assistance in determining the value of property such as the subject property, which is considered as having as its highest and best use future industrial development. There is conflicting evidence on the zoning of this area. The generalized zoning map, Exhibit 13, depicts the Valleyfield area as a Direct Control District. Mr. Hamilton testified it was zoned Agricultural (Future Industrial District).

The Board has come to the conclusion, after considering all factors affecting the subject property, that the opinions expressed by the appraisers who testified have been of little assistance to the Board.

The evidence is that the property, with the exception of the small dwelling upon it and the out-buildings which were in a run-down condition, has remained for many decades as an undeveloped subdivision lacking the construction of streets and lanes. In addition, because of its proximity to the flight paths of aircraft landing and taking off from the Calgary International Airport, it is unlikely that it would ever become suitable for residential purposes. The valuers all considered that the property, at some time in the future, would have been developed as an industrial site. They disagreed, however, as to when such development would take place. Mr. Leslie considered that industrial development was imminent. Mr. Hamilton, on the other hand, considered that development for industrial purposes would not occur for another five to ten years.

As the Board has pointed out, the property, which is in Block 37 of Subdivision Plan 5589 A.D., lies north of 26th Avenue N.E. between 14th and 15th Streets N.E. This is shown on Plan 5589 A.D. put in as part of Exhibit 6. It should be mentioned that this location does not correspond with the location of Block 37 on a contour map, Exhibit 3, and other maps entered at the hearing by the parties. The contour map shows the lots fronting on 24th Avenue N.E. between 13th and 14th Streets N.E. Generally, however, the lots lie at an elevation lower than the Regal golf course area to the south west of the property and the area east of the property lying east of 15th Street N.E.

The lands have the advantage of proximity to a railway right-of-way and, while restricted to specified uses under zoning regulations, appear to have some potential for industrial or commercial development in the future. It cannot, of course, be established with any degree of certainty when such an event might have occurred had the City not expropriated the land for roadway purposes but the Board is satisfied that the time is not too remote to be considered. Also to be weighed is the effect the airport has on the location of the property, which appears to lie directly under

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the flight path of aircraft taking off and landing which factor limits the type of development which could be undertaken.

As was said by Johnson, J.A. in *Calgary Power Ltd. v. Danchuk* (1963) 41 W.W.R. 124 at p. 127:

"..... Nor is the possibility that at some time in the future changes in zoning will permit other methods of subdivision to be ignored. That such possibilities play a part in arriving at the present value is clear from the decisions. Grant, J.A. in *Re Forbes and Toronto*, 65 OLR 34 (1930) 2 DLR 650, at 654 says:

' The authorities are quite clear to the effect that the arbitrator should take into consideration the probability or even the possibility of the rescission of any by-law restricting the use to which the property might be put. It is his duty so to do.'

"

With all these factors in mind, and after considering the evidence and the argument of counsel, the Board is satisfied that a prudent man in the position of the Respondents in this case would, at the time of the expropriation, have been prepared to pay \$12,000 for the property rather than be deprived of it.

Concurrently with this decision the Board will issue an order fixing compensation in the amount of \$12,000, which amount will be subject to the payment of interest by the City at the rate of 7% per annum from April 1, 1971 until paid, taking into account an amount of \$9,000 advanced by the City to the owners on June 4, 1971.

With respect to costs, it is the City's submission that the offer of \$12,000 for the expropriated property made by the City to the Respondents is in excess of the value placed on the property by Mr. Hamilton and that the City, notwithstanding the value estimated by Hamilton, is still prepared to pay \$12,000 for the property subject to the City being awarded costs.

The matter of costs is in the Board's discretion (section 60, The Public Utilities Board Act, chapter 302,

R.S.A. 1970). The Board has pointed out that evidence relating to the value of the expropriated property was far from satisfactory and the valuers called by the Respondents proceeded on a wrong basis. The Board is of opinion that the offer made by the City, and rejected by the Respondents, represented a reasonable offer and one, which on the basis of the evidence, the Board has found to be the value of the property at April 1, 1971.

In these circumstances the Board has come to the conclusion that the City is entitled to costs and accordingly the Board, in its order, will direct that costs be awarded to the City in such amount as may be agreed to by the parties, failing which as may be fixed by the Board.

DATED at the City of Edmonton, in the Province of Alberta, this 7th day of December, A. D. 1971.

PUBLIC UTILITIES BOARD

(SIGNED) W. NOBBS

CHAIRMAN

Certified a true copy.

Secretary

NO. 30370



File: Ex-Co-17-42

IN THE MATTER OF "The Pipe Line Act"; and

IN THE MATTER OF "The Expropriation Procedure Act"; and

IN THE MATTER OF an application to the Public Utilities Board by Peace River Oil Pipe Line Co. Ltd. for an order granting to the Applicant a right-of-way over, across and under certain lands for the purpose of constructing and maintaining an oil pipe line and fixing the amount payable by the Applicant for such interest and for incidental damages and costs.

BETWEEN:

PEACE RIVER OIL PIPE LINE CO. LTD.

Applicant

- and -

JOSEPH M. SHECKTER, MOBIL OIL CANADA, LTD., RAINBOW PIPE LINE COMPANY LTD., MUNICIPAL DISTRICT OF STURGEON NO. 90, MINISTER OF PUBLIC WORKS AND THE ROYAL TRUST COMPANY

Respondents

APPEARANCES:

R. L. Fenerty, Esq., Q.C.	:	for Peace River Oil Pipe Line
	:	Co. Ltd.
	:	
A. F. Moir, Esq., Q.C. and	:	
S. E. Wood, Esq.	:	for Joseph M. Sheckter

D E C I S I O N

This is an application by Peace River Oil Pipe Line Co. Ltd. (hereinafter referred to as "the Applicant") to the Public Utilities Board for an order declaring the estate or interest to be granted to the Applicant over, across and under certain lands owned by Joseph M. Sheckter (hereinafter referred to as "the Respondent") for the purpose of constructing, maintaining and operating an oil pipe line and fixing the amount of money

payable by the Applicant for such interest and for incidental damages and costs.

The land required for the right-of-way is described as follows:

A strip of land 80 feet in width throughout situate in the South East Quarter of Section Five (5), Township Fifty-four (54), Range Twenty-three (23), West of the Fourth Meridian, in the Province of Alberta, containing 4.32 acres more or less;
RESERVING THEREOUT all mines and minerals.

The right-of-way is delineated on a plan registered in the Land Titles Office for the North Alberta Land Registration District as Plan 360 R.S.

The original authorization for the Applicant to enter upon the land for the purpose of commencing construction was granted by the Board by its Interim Order No. 28841, dated September 11, 1968, and this date, accordingly, becomes the effective date of the expropriation.

The subject property is situated approximately 1 mile north and 1/2 mile east of the northeasterly Edmonton City limits. The land was described in Exhibit 42-4 as follows:

"It is bounded on the east by an all-weather high grade gravel road, on the south by an all-weather high grade gravel road. The subject land is generally level having only slight depressions or low spots in some areas. There is a deep treed ravine running through the property beginning at the northwest corner of the subject property and running at an increasing angle to a point approximately 560 feet south of the northeast corner of the property. This ravine will make ideal building sites for residential dwellings having land areas of one acre or more. The balance of the land is well suited for agricultural purposes. The Peace River Pipeline enters the subject property at a point approximately 60 feet north of the southeast corner of the property and runs parallel to the existing Rainbow Pipeline right of way along the east boundary of the subject property and leaves the property at the northeast corner. There are no improvements on the said property."

In addition to the two pipe lines referred to in the above description, the land is crossed by an 18 inch sanitary sewer line running in a diagonal fashion from the north west corner to the south east corner of the property. The right-of-way for the sewer line was obtained pursuant to an agreement (Exhibit 42-6) made between the Respondent and the Minister of Public Works, dated June 21, 1968, wherein the Respondent agreed to sell to the Minister a fee simple interest in 8 acres of his property for the total consideration of \$25,000.00. The agreement also provided, inter alia, that the Respondent would be permitted to tie-in to the proposed sewer line at no more than two points for the purpose of accommodating residential development. In a letter from Mr. E. E. Wilson, of the Department of Public Works, addressed to the Secretary-Treasurer of the Municipal District of Sturgeon, dated September 3, 1971, (Exhibit 42-11) it was stated that: "For the purposes of this agreement during negotiations a residential development was defined as any residential development which would be permissible by the municipal government concerned,". Power, water and natural gas are readily available and a good paved highway, the 'Fort Trail' is located within 1/2 mile from the north west corner of the property. At the date of expropriation the subject property was apparently classified or zoned as agricultural land and any proposed change in such classification or zoning to a higher and better use would have to be approved firstly by the Municipality and then by the Edmonton Regional Planning Commission.

At the commencement of the proceedings, counsel for the Applicant advised the Board that no dispute existed as to the

width of the right-of-way applied for and he would, accordingly, not tender evidence relating thereto. The Board was further advised that surface damages caused by the construction of the pipe line were not in dispute and the only matters to be determined by the Board involved the quantum of compensation for the interest in land acquired and for damages under the head of injurious affection.

Evidence relating to the market value of the subject property was tendered on behalf of the Applicant by Mr. J. T. Caithness, an accredited appraiser, who advised that he had been engaged in the appraisal and sale of real estate in and around the City of Edmonton for the past 13 years. His

Appraisal Report (Exhibit 42-4) sets out in Appendix A a list of 28 sales that had taken place in and around the subject property. (Sale 29 appears to be a duplication of Sale 15.) Appendix B compares these sales to the subject property and indicates the manner in which adjustments were made in terms of dollars per acre with respect to time, location, soil and size. In connection with his estimate of land value Mr. Caithness made the following observations:

"The value of the subject property per acre of a one quarter section unit as shown on Appendix B is \$600.00 per acre."

"That portion of the subject property abutting the ravine for a distance of 500 feet back from the ravine could be subdivided and sold on the basis of \$2,000.00 per acre."

"The balance of the subject property could not be subdivided into parcels as small as those in the ravine area or the area required for the pipeline right of way. However, if it were possible to subdivide the balance of the subject property into small areas as is the case with the pipeline right of way, the price per acre could be increased by 50%, as is in the case with most residential lands subdivided into small acreages. Therefore, the effective price per acre for a small parcel comparable to that of the right of way is \$900.00 per acre."

In connection with injurious affection Mr. Caithness stated that:

"Injurious Affection by reason of the presence of the Peace River Oil Pipeline, exists only as to those restrictions that might effect future building developments on the subject property and is not calculated at this time as the amount of injurious affection is highly speculative."

During the course of the hearing questions were asked by counsel for the Applicant and answers given by Mr. Caithness as follows:

"Q. In any event, in arriving at these values, you are telling me you did take into account - - apart from the speculative possibility existing at that time of subdivision and use for small parcels, you say you would have used \$600 per acre.

A. For a large portion, yes.

Q. Taking into account the speculative possibilities that existed in 1968, but recognizing all the costs that would be incurred before this speculative possibility could be recognized, you still came up with a value of \$2,000 in the immediate ravine area, is that right?

A. That is true.

Q. And 900 elsewhere?

A. That is true."

and further, on re-direct examination:

"Q. Did you in fact take into account the speculative possibilities that existed in 1968 when you made the appraisal, the speculative possibilities of subdivision and use, for any of these uses?

A. Yes I did. You know, I looked at the potential of the land. In each case I tried to examine the reasons that the people bought it, and what the potential was in the future. It all has a potential of subdivision, but it is a hard thing to get through in that area.

Q. Did you take into account in your figures the availability of sanitary sewer connections to these particular lands?

"A. Yes, Mr. Sheckter told me about his agreement with the Government, and I had no reason to disbelieve him. I considered, in looking at his land, that this gave him an edge on the other ones, and I allowed for that in the appraisal.

Q. Can you tell me, are you qualified to express an opinion as to whether the 150 feet on the - - we will call it 140 feet on the easterly edge of this parcel which is now occupied by Rainbow and Peace River pipe line rights-of-way, how it compares in desirability for use for mobile home sites, as compared with the balance of the parcel to the west of that?

A. I think that anyone planning a subdivision of any kind within a quarter section, where they have no protection as to what can happen across the road from them, it would be very desirable to have a buffer strip between the road and any subdivision. In looking at it again, the potential of this site with respect to the pipe line right-of-ways, this portion, you wouldn't be building on it anyway. You could use it as a buffer strip between the roads. I considered this under the injurious affection part of it."

Mr. Caithness calculated that the area of the ravine lots affected by the right-of-way was 2.94 acres, leaving a balance of 1.38 acres of right-of-way lying in the level area of the quarter section. He conceded, on cross examination, that the topography of the land was ideal to handle surface drainage and that the only thing which prevented the land from being developed was approval.

Mr. G. M. Hasegawa, a civil engineer, after being qualified, gave evidence relating to the cost of servicing the Respondent's proposed mobile home park development with all required utilities. The Respondent, on taking the stand, testified that he had purchased the subject property some 5 or 6 years earlier with the intention of developing it into some better use than farm land. His evidence was to the effect that he first started work on the plans for a country residential subdivision and

that after the sewer line was installed he commenced working on plans for a mobile home park. These plans were amended from time to time to comply with changing municipal regulations and, although a formal approval had not been received at the date of the hearing, it was expected that such approval would be forthcoming at any moment. On being questioned about utilities he said:

"There's the gas, the natural gas very adjacent to it; there is roads on two sides of it that are in first-class condition and well maintained; there is the power right along-side the property; there is a natural ravine for recreation; there is the water in the vicinity, we have the sewer pipe. So, it had all the criteria for establishing any urban type of residential development on it."

It was his opinion that the land, for a mobile home development, was worth \$12,000.00 per acre.

On cross examination the Respondent advised that he had paid about \$344.00 per acre for the land when he purchased it and that 2 or 3 years later he negotiated an easement for a right-of-way with Mobil Oil Canada, Ltd., for which he received a total consideration of \$8,500.00. He could not recall whether or not this payment included compensation for the injurious affection caused to a 16 or 17 foot strip of land lying between the right-of-way and the road running along the east boundary of the property, although the suggested acreage figures would appear to indicate that such was the case. The interest in land acquired by Mobil Oil Canada, Ltd. was subsequently transferred to Rainbow Pipe Line Company Ltd., hereinbefore referred to as the "Rainbow Pipeline right of way". When he was asked about the proposal which was made to the municipality in connection with his plans for a country residential development the Respondent stated:

"We made a proposal for country acreage residences, and at a meeting that was held in the Edmonton Regional Planning Commission on September 25th, 1968, this application - - I made it actually to the Municipal District of Sturgeon and they in turn had to make the official request on my behalf or at - - when I make the application to them, they turn around and make it to the Regional Planning Commission to have it re-zoned from low density agricultural to country residence. It says in this, at the meeting here, 'Council favours the proposal as it is considered an appropriate use for this area.' Then it goes on to say that the City Planning Department has indicated that any consideration of country residence along this ravine should be for the whole ravine area from the river to the Alberta Hospital site. Additionally they expressed concern for the size of the lot and the design. It says here, 'In general, this area would seem to be suitable for country residence development, providing there were no apparent conflict with the city's general plan. It would appear from a perusal of the general plan that urban development would not be likely in this area in the foreseeable future."

On examining the whole of the evidence it is apparent that the expressions of value advanced by and on behalf of the Respondent are based on the assumption that the subject lands have been zoned to their highest and best use and that actual subdivision has taken place. In the case of *In Re Board of Education for North York v. Village Developments Ltd.* (1956) 3 D.L.R. (2d) 161, it was held:

"While the general rule for fixing compensation for expropriated land is to determine its present value to the owner in terms of all its advantages, present and future, which the land possesses, nevertheless it is wrong in determining the value of land, which, admittedly is suited for a subdivision development, to ignore the statutory requirement of approval to any subdivision plan under planning legislation and to fix compensation as if the owner were entitled to proceed to an immediate sale of the land as building lots. Regard must be had to all the eventualities foreseeable or only vaguely foreshadowable by which a prudent person, looking forward immediately before the expropriation would be influenced."

In fixing compensation it is proper for the Board to consider the future subdivision potential of the area but it is

not proper to proceed upon the basis that the anticipated zoning change has been accomplished and the subdivision plan approved.

For this reason the expressions of opinion of the Respondent regarding the value of the subject lands for use as a mobile home site are of no assistance to the Board in reaching a conclusion as to the value of the land as at the date of expropriation and these opinions, therefore, must be rejected.

The Board has, however, given careful consideration to all of the sales referred to and, in particular, the 'Rex Underwood' sale and sales 15, 16 and 24 mentioned in the Appraisal Report.

The Board is of the opinion that the approach used by Mr.

Caithness in arriving at his conclusions regarding the market value of the subject lands, in the absence of expert evidence to the contrary, is appropriate in the circumstances of this case. Bearing in mind the principle that a small parcel of land would likely command a higher price per acre on the market than would a large parcel and the fact that the subject lands possess special amenities for future residential subdivision, the Board has made an upward adjustment in the land value estimates to compensate for these factors and will award compensation for the interest in land acquired by the Applicant on the basis of \$2,000.00 per acre for land in the ravine area and \$1,000.00 per acre for the remaining land.

A good deal of the evidence adduced at the hearing was directed to the proposed development of the subject property to a higher and better use, in particular, a mobile home park. For example, there were expressions of opinion regarding the demand for and rental value of mobile home 'pads' or 'stalls'; the cost of servicing the park site with utilities; the advantages

accruing because of the existence of the sewer line across the property; the regulations which must be complied with and approvals obtained prior to and during development of the site; the price that a developer could afford to pay for land ready for such use and other related matters. In the Board's view this evidence has very little relevance to the main issue to be determined by the Board, namely, the value to the owner of the property as it stood at September 11, 1968, and such evidence must, to a large extent, be disregarded.

The prices being paid for land in the general area is a clear indication that the land has a strong potential for development to a higher and better use. Following the reasons set forth in the case of *Copithorne vs Shell Canada Limited* (1969) 70 W.W.R. 410, the Board is bound to give some consideration to injurious affection. The evidence adduced in this regard was too vague to be of much assistance to the Board and the Board was not presented with particulars of any specific amount claimed under this head of damage. However, on considering the location of the right-of-way in relation to existing building prohibitions relating to pipe lines and considering further the evidence in connection with the probable future use of the land, the Board has concluded that an award in the sum of \$1,000.00 will adequately compensate the Respondent for any claim for injurious affection.

After having considered the submissions of counsel in connection with the matter of interest and having made a thorough examination of its records in this regard, the Board has concluded that interest on the award at the rate of 7% per annum may equitably be awarded from the date of the interim order until the

date of the Respondent's first request for an adjournment (September 11, 1969) and then from the date of the Board's first adjournment (December 15, 1969) until the date of the Respondent's second request for adjournment (May 11, 1971). Appropriate adjustments will be made to take into account the advance payment, in the sum of \$2,500.00, which went forward from the Board's offices on March 17, 1970.

Concurrently with this decision the Board will issue its order declaring the interest in land granted to the Applicant and the compensation and damages awarded to the Respondent.

Costs will be awarded to the Respondent at such amount as may be agreed upon between the parties, failing which, at such amount as may be fixed by the Board.

DATED AT EDMONTON, in the Province of Alberta, this 30th day of November, A.D. 1971.

PUBLIC UTILITIES BOARD,

(SIGNED) K. J. LEATHEM

MEMBER

Certified a true copy.

Secretary

IN THE SUPREME COURT OF ALBERTA
Trial Division
Judicial District of Edmonton

No. 51315

BETWEEN:

FRANCES M. MCKEE,

Claimant

- and -

HER MAJESTY THE QUEEN in the right
of the Province of Alberta, repre-
sented by The Attorney General,

Respondent.

ORAL JUDGMENT

of the Honourable Mr. Justice J.V.H. Milvain

This case involves some deeply interesting problems surrounding the manner in which compensation should be made by public authority with respect to land expropriated. In this instance the land is expropriated by the Province of Alberta on behalf of the University of Alberta. The land owner whose property is involved is Mrs. Frances M. McKee.

Prior to expropriation and for some years before she has been the owner of Lot 15 and the most southerly 22 feet of Lot 16, in Block 177, Plan 2003 A.R. of the City of Edmonton. This land is situated at the northeast corner of the intersection of 87th Avenue and 112th Street in the City of Edmonton. At the present time there are, on the property, two buildings, one of which generally speaking is quite a large-sized residential property with two full storeys and a partial third storey, this building is occupied by the owner and her husband as their home and parts of it are rented to University students. The smaller building on the property and the newer one is also designed as rental property and is rented to a student.

According to the evidence before me the total rentals that are obtained from this property and excluding any value for occupation by the owner would be some \$370.00 per month. Now the expropriating authority feels that this property should be valued solely on the basis of it being a residential property and called before me an appraiser giving a valuation to the property on the basis of it being single residential of some \$34,000.00. The owners on the other side contend this property should not be valued solely from a residential basis but that it should be valued from a commercial or combined residential-commercial basis and evidence was called before me in that regard placing a total value on the property of something slightly over \$86,000.00.

It is of course realized that when compensation is made to the owner of property, in the event of an expropriation having been made, the owner is entitled to what has been variously described, by the authorities, as the fair market value of the property or what I think is probably a more exact definition, the value of the property to the owner at the time of expropriation.

The courts have laid down a variety of avenues which may be followed in arriving at the value but to my mind probably the best basic principle to be followed in determining value to the owner is to consider what a prudent owner, in possession of property at the moment of expropriation, would pay for the property rather than lose it. This, of course, does not mean the court can properly take into consideration any particular subjective sentimental values which an owner might place on the property but it must be done on the objective basis of that fictional prudent owner.

In order to understand the complication which lies behind my problem I must call to mind and bear in mind that for some time prior to 1965 it became obvious the University of Alberta must expand and the normal course of its expansion would carry it into the area in which the subject property is situated; and consequently in August of 1965 the Government of Alberta, pursuant to authority conferred by Sections

25 to 30 of The Public Works Act declared the general area in which the subject property is to be a public works area. That is to say one in which the property would eventually be taken over by the public, the reason, of course, being that it was foreseen that this area of land and the properties in it would ultimately be required for University purposes. I have no doubt but that these procedures were properly and legally carried out and to use the vernacular phrase that has been used throughout the proceedings before me the area became frozen.

Unquestionably, following this freeze order, negotiations took place with a view to arriving at an agreed compensation, this failed and under date of the 14th of December, 1966, the requisite expropriation notice was filed and the property then ceased to belong to Mrs. McKee any longer and it became public property by virtue of that expropriation. It is under these circumstances that I am now called upon to fix the amount of compensation.

I am, of course, bearing in mind in doing so the basic principles of law I previously mentioned and all of which I went into at considerable length in my judgment of Walter Woods and The City of Edmonton; it wouldn't serve much purpose in my repeating here what I then said.

The gist of the problem before me may be quite simply summarized: it is the position of the Crown that in valuing this property for the purpose of compensation, a Court in my position cannot consider anything other than a residential value because of the property being, so to speak, condemned from a value point of view by virtue of the freeze order made in August of 1965. The owner on the other hand contends that I am not bound, in considering the elements that go to compensation, to confine my consideration to that of residential property but that I am entitled in law to consider the potentialities of the property as they would have been at the time of the expropriation were there not a freeze order. It is my view that in law I am not confined to the artificial value which has been placed on this

property by the freeze order. To do such, in my mind, would be an extremely inequitable and unlawful thing to do.

I don't find it necessary to quote a great deal of law in support of the statement I have made, I wish to refer however to one or two. In the first place I should like to refer to a statement that was made by the late Chief Justice of Canada in 1910, he then being merely Mr. Justice Duff. The case in *Cunard v. The King*, it is cited in 43 Supreme Court Reports, page 88 and I quote what was said by Mr. Justice Duff at pages 99 and 100 of that report as follows:

"One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence."

This same principle was followed by the Court of Appeal in Ontario in the case of *Teubner v. The Minister of Highways*, the citation that I am looking at, at the moment, is in 50 D.L.R. 2nd Edition at page 195. In that case Mr. Justice Roach of the Court of Appeal said at page 201, and I quote:

"The law is well settled that the compensation to which an owner whose lands have been expropriated is entitled, for the lands taken, is their value to him in their then actual condition with all their existing advantages and possibilities but excluding any advantage due to the carrying out of the scheme for which those lands have been compulsorily taken."

This, of course, carries with it as a necessary corollary that one excludes too, the disadvantages that have been brought upon the property because of the carrying out of the scheme.

The same thought was expressed by Mr. Justice Wilson, as he then was, of the Supreme Court of British Columbia, he now being the Chief Justice, in the case of *Electric Power Act and Re Nanaimo Duncan Utilities Limited* in (1953) D.L.R. New

Series at page 461 and I don't propose to quote what was said by Mr. Justice Wilson but it is in support of the thesis I make that when land has been given an artificial depreciation in value by a public authority which intends to take it over that then and in such event no court, in fixing compensation, is bound immutably to that artificially decreased value, brought about by the authority which in fact is now doing the expropriation. If such were the case it would mean that, in law, the public authority which can move, as was done in this case, to freeze property for a purpose could in effect at that moment expropriate the property to its own use but not pay the owner for it until some future time when it sees fit to actually expropriate; and to do so on the basis of the depressed value, the factual act of expropriation through the freezing had given the property.

I am therefore of the view that in measuring compensation, as I must do, at this stage, I must measure the value of the property to a prudent owner as of the date of expropriation, in this instance the 14th of December, 1966, assuming to the property the normal natural propensities it would have had were the freeze order not in existence.

Now so far as this property is concerned the evidence is clear before me that, from a zoning point of view, it is in that strange mystical area under which there is in fact no zoning, where one is guided by a land use guide; and building permits are granted by the City on the basis of each individual application.

It is clear before me that immediately to the south of this property on 112th Street, that is to say just merely crossing 87th Avenue, a property has been given a development permit which allows a combined commercial-residential use. Now as to whether or not, in the absence of the freeze order, an application with respect to the subject property would succeed no one can say with complete assurance. However, on the balance of probabilities, it would seem to me at least that such a building permit would be granted; because I cannot see within the meaning of the planning legislation, how it

could be said that it was necessary from the point of view of the orderly and economic development of the general area that use should be restricted to residential, when immediately across the avenue, such a use has been permitted. However, this is one of the features of uncertainty which do exist and must be borne in mind in fixing a value.

I think I must bear in mind that historically with respect to this property in 1959 a group of Roman Catholic Sisters offered \$55,000.00 for the property as residential property which offer was refused by the owner. In August of 1962 an offer was made by a developer at \$52,500.00 on condition that a building permit be issued that would permit commercial use, being in this instance that of a bank. The same was repeated by a further offer at \$52,500.00, which was related to this Court by His Honour Judge Haddad, as he now is, but who acted as solicitor in the matter then.

In both of these instances the deal did not go through because of the fact the City authorities refused the building permit. It appears clear, on the evidence before me, that if not the main reason at least one of the great reasons for the refusal of the permit was the appearance of a representative on behalf of the University opposing the issuance of such a permit; and the City Council taking the position that this land for some time had been looked upon as potential University property and for that reason they were not going to grant the permit.

Now, with that background I was given evidence as I said earlier on behalf of the owner of valuation on the basis of a commercial use of the property of some \$86,000.00 and on the basis of evidence called by the expropriating authority that as residential alone the property was worth a mere \$34,000.00. As I said before, it is my feeling that I am not bound to look at this property solely as residential; but that I may look at it from the point of view of the potentialities it had in the absence of the freeze order.

Now, assuming the best in this regard Mr. Klinck, who gave extremely cogent evidence on behalf of the owner,

placed this value at some \$86,000.00 and he did it chiefly by comparing it with the three lots forming part of the land occupied by the building I mentioned south across the intersection. He arrived at comparative values that would price this land at something in the neighborhood of eleven to \$12.00 per square foot and allowing a thousand dollars value to the small building which might be removed he arrived at the figure of eighty-six thousand odd dollars.

Mr. Jellis, an appraiser, who was called on behalf of the expropriating authority, arrived at the residential value of \$34,000.00 and then because he had been asked to do so at rather a late stage, he gave his idea of a fair value on the basis of it being commercial and he comes up with a fair value of perhaps somewhere around \$6.00 a square foot, or a value of \$44,000.00. He differed with Mr. Klinck in a variety of matters and among them a bonus to the property for its corner location. I have no doubt but that a corner location does give some appreciation in value from an economic and commercial point of view.

I am satisfied this owner cannot be given the highest value which can be placed on this property of something in the neighborhood of \$12.00 per foot because of the fact that discounting the existence of the freeze order there is involved the intangible uncertainty as to whether or not a building permit would be obtained; I think it would; but still it cannot be valued on the basis that it exists because it doesn't exist and for that uncertainty, of course, there must be some deduction from top value.

Exercising the best judgment I can in the matter I calculate on the basis of \$8.00 per foot and there being 7,260 square feet this arrives at a total value of \$58,080.00, rounding it off to even figures I fix the compensation at \$58,000.00.

I do not find in this case any of those immeasurable contingencies that can be considered, in the now defunct ten per cent rule, and I am awarding nothing on that basis. I am awarding no interest because of the fact that according to the evidence before me and the statements, so fairly made by

counsel, I understand the McKees are occupying the premises without rent. Mrs. McKee is entitled to costs of this application which I direct shall be taxed as nearly as is possible to do so within what would be allowed by column 5 increased by one-half of the rules with respect to cost.

Unquestionably Mr. Klinck as an expert has had to be paid special fees and those fees should be taxed as a disbursement, if there be any serious question as to the amount of his bill the matter may be referred to me.

I should like to say specifically to counsel in this case and the expert witnesses who gave evidence before me that I am deeply grateful to them all in that this rather complicated matter has been placed before me with such thorough fairness that I am able at the conclusion of the evidence to deliver judgment from the bench as I now have. Had the case not been so presented there is no question but that it would have been impossible for me, or any other Court for that matter, to give a judgment without reservation.

EDMONTON, Alberta,

27 January 1967

W. A. Stevenson, Esq.,
J. N. Agrios, Esq.,
For the Claimant.

B. S. Rawson, Esq.,
For the Respondent

HSA
CS

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

The Court:

The Honourable H. G. Johnson
The Honourable N. D. McDermid
The Honourable C. W. Clement

IN THE MATTER OF The Municipal
Taxation Act, and

IN THE MATTER OF The City Act, and

IN THE MATTER OF a Decision of the
Alberta Assessment Appeal Board dated
March 17th, 1969 with respect to appeals
to the Alberta Assessment Appeal Board
from decisions of the Court of Revision
of The City of Calgary in respect to
assessments made by the Assessor for the
said City of the properties owned by the
Appellants and entered in the 1968
Assessment Roll of the Respondent
Municipality as follows:

THOMAS L. BROOK, Roll No. 128-30
Block A, Plan 2795 G.T., 13.39 acres, and

SUNNYBROOK HOLDINGS LTD., Roll No. 12-150
Block 3, Plan 8539 G.J., 20.59 acres, and

IN THE MATTER OF The Board of Public Utility
Commissioner's Order No. 20027 dated June
4th, 1957.

BETWEEN:

THOMAS L. BROOK and SUNNYBROOK
HOLDINGS LTD.

Applicants
Appellants

-and-

THE CITY OF CALGARY

Respondent
Respondent

REASONS FOR JUDGMENT

of The Honourable Mr. Justice Clement

The appellants each own a parcel of land, one of 13.39 acres and the other of 20.59 acres, that had formerly been within the Municipal District of Rocky View No. 44. In June 1957 these and other lands were annexed to the City of Calgary by order No. 20027 of the Board of Public Utility Commissioners as it was then designated. Section 148 of The Public Utilities Act, 1955, R.S.A., Cap. 267 in its relevant terms provides that such order

. . . may be made subject to such terms and conditions as to the Board seem proper, and in particular the order may

- (b) contain directions that the city assess the land in such territory upon any basis or principle of assessment that seems proper to the Board, and that the city continue to do so for a fixed term of years, and
- (c) fix a maximum rate of taxation for the land in the territory for a fixed term.

(See now The Public Utilities Board Act, 1960 Statutes of Alberta, Cap. 85, section 183 (2)). The order was made subject to a number of terms and conditions. This appeal is concerned with the interpretation and application of such of them as affect the assessment to taxation of the appellants' lands. The validity of the order itself is not questioned.

Following annexation and until 1968, the City assessed the lands to taxation upon the same basis as they had been theretofore assessed by the Municipal District in conformity with the conditions of order No. 20027. Prior to October 31st, 1967, sewer and water lines were installed along parts of the boundaries of each parcel, and it is an agreed fact that "the said lines were open to connection in respect of

"each parcel". In 1968 the City assessed both parcels pursuant to the provisions of The Municipal Taxation Act: that is to say, they were assessed on the same basis as other comparable City land without the limitations or restrictions of order No. 20027. This increased very substantially the assessment of both parcels. The assessment was confirmed by the Court of Revision, and on appeal the Alberta Assessment Appeal Board by its order No. 40/69 confirmed the Court of Revision for the reasons therein stated. It reaches this court on an application for an order by way of certiorari that the parcels be assessed in accordance with the conditions of order No. 20027.

It is convenient at this point to set out the terms and conditions of order No. 20027 bearing on taxation:

3. It is a further condition of this Order that all small holdings occupied by veterans under the provisions of The Veterans' Land Act are to be assessed on the same basis of assessment as would be applicable to them had such parcels remained in the Municipal District of Rocky View No. 44, and the maximum rate which the City may tax such lands shall be the mill rate of the City of Calgary or of the Municipal District of Rocky View No. 44, whichever is the lesser. At the expiration of ten years from the date of the Veterans' Agreement, or at such time as a veteran is entitled to take Title and dispose of his holdings or part thereof, such holdings or part thereof shall be assessed and taxed in the same manner as other properties within the City.

4. It is further ordered that any parcel of land of eight (8) acres or more from which the owner or tenant derives an income sufficient to provide his principal livelihood from the production of crops or livestock or from fur production, bee-keeping or hog ranching, shall be assessed as farm lands and shall be taxed at the current mill rate prevailing within the City, and the buildings and improvements necessary for the said operations shall be exempt from taxation.

5. It is further ordered that any parcel of land in the areas annexed by this Order from which an owner or tenant does not derive an income sufficient to provide his principal livelihood from the production of crops, livestock, fur production, bee-keeping, hog ranching or any of them, shall be assessed and taxed as follows:

(a) that portion of such parcel on which the dwelling house and other improvements are located together with a reasonable yard area, shall be assessed and taxed as a residential lot, having due regard to urban services available thereto;

(b) The remainder of such parcel as farm lands.

Such parcels shall be taxed by applying thereto the current mill rate of the City.

6. It is further ordered that the land, buildings, and other improvements, the property of the Calgary Golf and Country Club shall be assessed and taxed as follows:

(a) buildings and other improvements shall be assessed in the same manner as similar buildings and improvements are assessed within the present boundaries of the City, having due regard to urban services available thereto;

(b) land shall be assessed and taxed as park lands having due regard to its restricted use as a golf course.

9. All of the foregoing is subject to the general condition that, exclusive of any rate necessary to raise the cost of local improvements abutting any parcels of land in the said area, the taxes charged in respect of parcels of land in the said area to which the City has not made water and sewer available will not represent an increase over the taxes that the parcel would be liable for had the area remained in the Municipal District. As soon as the City has made water and sewer available to any parcel of land within the said area then normal City taxes, subject to the foregoing conditions, will apply to that parcel. In determining for the year 1957 the taxes that would have been paid had the parcel in question remained in the Municipal District the 1957 reassessment will be used.

Order number 40/69 of the Alberta Assessment Appeal Board records the issue with which this appeal is concerned in the following paragraphs:

The appeals herein are brought on in respect of the assessments of the land only and it is contended that even though sewer and water lines have been installed along certain frontages of each parcel, the land should nevertheless be assessed under the provisions of condition 5 of Board of Public Utility Commissioners Order No. 20027. To the converse, the Respondent contends that prior to October 31, 1967 sewer and water was made available to each of the parcels of land in question and therefore the restrictive conditions of assessment, set out in B.P.U.C. Order No. 20027, have no further application.

.

The main issue raised in this appeal is simply whether the Appellants' lands fall subject to assessment under condition 5 of B.P.U.C. Order No. 20027, or the relevant provisions of The Municipal Taxation Act. In answering this question it is, at the outset, necessary to refer to the said Order No. 20027 and in particular to conditions 5 and 9 which read as follows:

"5. (See above).

"9. (See above).

.

Whether these parcels of land, having had sewer and water made available to them, fall liable to assessment under the provisions of The Municipal Taxation Act, the Board feels it must be guided by the words of Cairns J.A., delivered in the Supreme Court of Alberta, Appellate Division, in the case Engineered Buildings Limited v. City of Calgary (supra) wherein at page 283 he states as follows:

" I particularly draw attention to condition 9, which provides that as soon as the city has made water and sewer available to any parcel of land within the said area, the normal city taxes will apply. Whether this has occurred is a question of fact on which no appeal lies to this court. The Alberta Assessment Appeal Board, from whose order this certiorari was taken before Dechene, J., found as a fact that sewer and water had been supplied. It follows, therefore, that even if condition 5 did at one time apply, it no longer applies, and we must therefore ascertain what normal city taxes were, and to do so we return to sec. 458 (9) and (10), of which I have already indicated the proper interpretation..

.

It follows that in the opinion of the Board the Court of Revision was correct in finding the lands in question to be assessable under the provisions of The Municipal Taxation Act "

It is a principle of law, expressed in the term stare decisis, that like cases should be decided alike; and I assume for the purposes of this decision that the principle applies to judgments of this court, without examining the submission to the contrary made by counsel for the appellants since it is not necessary to do so in view of the conclusion I have reached. The judgment in Engineered Buildings (1966) 56 W.W.R. 277 must therefore be examined to determine whether the passage relied on by the Alberta Assessment Appeal Board is an additional ratio decidendi, or is obiter dicta, since

the court had in earlier passages of the judgment reached its conclusion on other grounds. .

In that case the point in issue was the proper basis of assessment of certain parcels of land owned by that company. As in the present case, they had been annexed to the City of Calgary in 1957 by Order No. 20027 of the Board of Public Utility Commissioners. Subsequently the parcels were subdivided and in 1963 they were zoned under the provisions of The Planning Act to permit urban types of development, although at that time they were being used in fact for agricultural purposes and had been so assessed since annexation. In 1964 they were not being put to any use, and in that year the City assessed them, not as agricultural lands, but at their fair actual value, which substantially increased the assessments. The judgment of the court was delivered by Cairns J.A. who said in part:

The whole case turns on the proper interpretation to be placed on subsections (9) and (10) of section 458 of The City Act, supra, as applied to the above facts. .

This was followed by a detailed discussion of the law applicable to the proper interpretation of the statutory provisions referred to, and the decision was that under those provisions the parcels should continue to be assessed as agricultural until the use prescribed by the zoning should come into effect.

This is clearly a ratio decidendi of the judgment, and has no bearing on the present case. The question is whether the passages that follow that decision express an additional ratio, or are obiter dicta:

Counsel for the appellant urges in the alternative, in the event that section 458 (9) does not apply, that the matter is covered by an order of the Public Utilities Board, being numbered 20027, and that by condition 5 of this order, this parcel of land should be taxed as farm land.

Even assuming that we can take judicial notice of this order, and this is very doubtful, as it was not published on two occasions in The Alberta

Gazette, pursuant to section 38 of The Public Utilities Act, R.S.A., 1955, Ch. 267, as it then was (now The Public Utilities Board Act, 1960, Ch. 85), we must by the same token look at the other conditions in the order.

Then occurs the passage quoted in order No. 40/69. In the present case that order was reproduced in the appeal book pursuant to the agreement as to contents, as being part of the Return to Certiorari and no issue was raised before this court as to judicial notice of it.

It is the ratio decidendi of a case, when applicable, that must be followed if the principle of stare decisis in its rigorous enunciation is to be sustained, and on this aspect of the case the observation of Devlin, J., as he then was, in his judgment in *Behrens v. Bertram Mills Circus Ltd.* (1957) 2 Q.B. at page 25, is in point:

It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observations obiter is also well established.

And in respect of obiter, I am guided by the statement of Viscount Haldane in *Cornelius v. Phillips* (1918) A.C. at page 211:

Dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding.

I am of opinion that the observations of Cairns J.A. on the effect of paragraph 9 of order No. 20027 are obiter dicta. He is there directing himself to an argument advanced by counsel for Engineered Buildings that paragraph 5 of the order afforded an additional ground for the relief the court had given by its decision on the construction of the provisions of The City Act whereby the assessment of the parcels as farm land was restored. It is obvious from his remarks that he

did not consider that the order was properly before the court, and his discussion was therefore on an hypothetical basis. Normally the ratio decidendi of a case is determined in relation to the facts taken into account by the judge as material or essential to his decision; and a discussion based on hypothetical facts is not generally considered to constitute a ratio decidendi (Dias: Jurisprudence, page 57). In discussing the basis for ascertaining the principle constituting the ratio of a judgment, Cross in his text Precedent in English Law at page 69 quotes Dr. Goodhart:

A conclusion based on a fact, the existence of which has not been determined by the court, cannot establish a principle.

I am content to accept this proposition as sufficient for the purposes of this decision, although the same result might be reached on other grounds..

I now turn to the construction to be placed on paragraph 9, in the context of the subject matter with which it deals: London & India Docks Co. v. Thames Tug, etc. (1909) A.C. at page 23. As is said by Lord Davey in Canada Sugar Refining Co. v. R. (1898) A.C. at page 741:

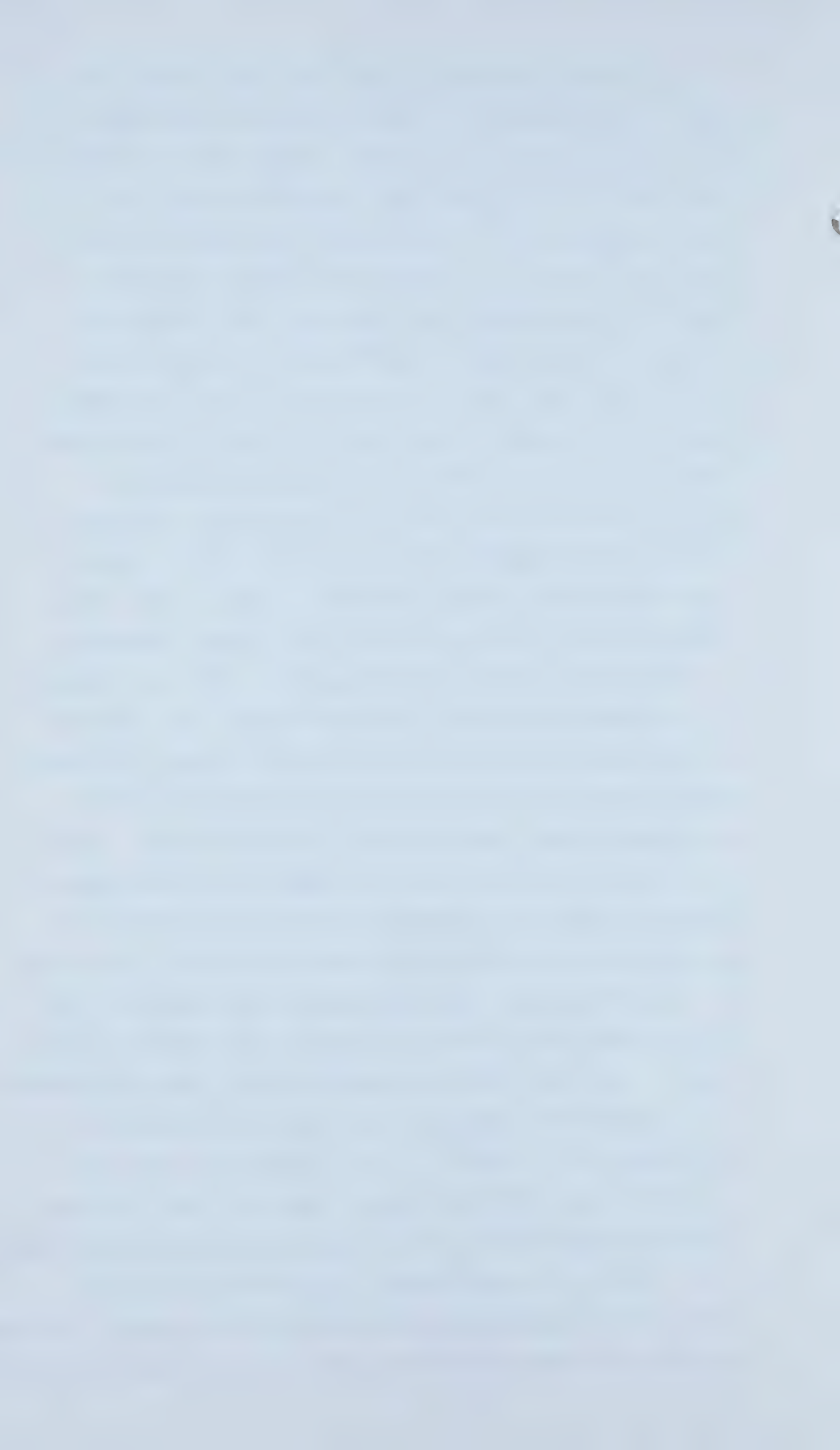
Every clause of a statute should be construed with reference to the context and other clauses in the Act, so as, as far as possible, to make a consistent enactment of the whole statute . . . relating to the subject matter.

This canon is as applicable to orders of the nature under consideration here as it is to statutes and other documents. In addition, assistance in coming to a proper interpretation may be gathered from the preamble of the order, which includes the following paragraph:

And it appearing that while there is a need for the annexation of the area and that it is particularly suitable for the purpose it is to be put, it will be sometime before the entire area is fully developed and in the meantime the taxpayers of the undeveloped portion will not be receiving much more in the way of services from the city than they had been receiving from the municipal district:

The subject matter with which paragraph 9 deals is found in paragraphs 3, 4, 5 and 6 above set out, which prescribe the basis of assessment to tax of the various categories of land respectively defined by them, and (except for the special provision in paragraph 3) make applicable thereto the current mill rate of the City. These provisions respecting assessment fall within subsection (b) of section 148 of The Public Utilities Act. It is to be noted that their operation is not contingent upon water and sewer service being available to any of the parcels affected. However, in respect of such of the parcels as do not have that service available, paragraph 9 in its primary operation as stated in its first sentence limits the amount of taxes that may be exacted from them, notwithstanding the provisions of the earlier paragraphs.

So far it is clear. The dispute is over the operation of the second sentence of paragraph 9 which looks forward to the situation when parcels within the earlier paragraphs, that did not at the outset have water and sewer service available to them, have now had it made available. Upon the happening of that event, the limitation on tax exaction provided by the first sentence is explicitly withdrawn by making such parcels subject to normal city taxes: but there is a qualification. The enlargement of the amount of tax that can be levied is made "subject to the foregoing conditions". By every canon of grammatical and legal construction the conditions so referred to can only be those found in paragraphs 3, 4, 5 and 6. Since paragraph 5 makes applicable in any event the current city mill rate, the only condition expressed by that paragraph is in respect of assessment. In my view the sentence affirms an intention to preserve the assessments prescribed by that paragraph, and on the basis of such assessments to tax at the current mill rate.



Thus, in the result the prescribed basis of assessment is preserved, but on such service becoming available the limitation on the amount of tax is removed.

I would allow the appeal with costs throughout and order the assessment (or assessments) in question to be quashed. It follows that the matter should be remitted to the respondent for reassessment.

(SIGNED) "C.W. CLEMENT"
J.A.

DATED at Edmonton, Alberta,
this 31 day of August 1970.

L. L. Ross, Esq.,
Counsel for the Appellants.

James P. Low, Esq.,
Counsel for the Respondent.

BETWEEN:

THOMAS L. BROOK AND SUNNYBROOK
HOLDINGS LTD.

Applicants
Appellants

- and -

THE CITY OF CALGARY

Respondent
Respondent

REASONS FOR JUDGMENT

I concur,
H. G. Johnson
J.A.

I concur,
N. D. McDermid

IN THE MATTER OF "The Municipal
Taxation Act"

AND IN THE MATTER OF appeals from
decisions of the 1968 Court of
Revision of the City of Calgary.

BETWEEN:

THOMAS L. BROOK
SUNNYBROOK HOLDINGS

Appellants

-and-

CITY OF CALGARY

Respondent

These are appeals to the Alberta Assessment Appeal Board from decisions of the Court of Revision of the City of Calgary, in respect of assessments made by the Assessor for the said city, of properties owned by the Appellants and entered in the 1968 Assessment Roll of the Respondent Municipality as follows:

Thomas L. Brook

Roll No. 128-30
Block A, Plan 2795 G.T. - 15.48 acres
Assessed Value of Land \$52,630.00

Sunnybrook Holdings

Roll No. 128-150
Block 3, Plan 8539 G.J. - 20.59 acres
Assessed Value of Land \$70,010.00
Assessed Value of Improvements 9,970.00

These appeals were heard jointly at City Hall, Calgary, Alberta, on March 4, 1969. Mr. Edward E. McNally, Barrister and Solicitor of Calgary appeared for the Appellants and Mr. J. Salmon, Solicitor for the City of Calgary, represented the Respondent. Mr. V.E. Aldridge, A.M.A.A., of the Assessment Department of the City of Calgary, gave evidence.

The appeals herein are brought on in respect of the assessments of the land only and it is contended that even though sewer and water lines have been installed along certain frontages of each parcel, the land should nevertheless be assessed under the provisions of condition 5 of Board of Public Utility Commissioners Order No. 20027. To the converse, the Respondent contends that prior to October 31, 1967 sewer and water was made available to each of the parcels of land in question and therefore the restrictive conditions of assessment, set out in B.P.U.C. Order No. 20027, have no further application. It is also submitted by Counsel for the Appellant T.L. Brook that the acreage charged to Block A, Plan 2795 G.T. is erroneous and should be corrected by deducting the roadway area purchased by the City of Calgary.

The agreed facts submitted in respect of the issues raised in this appeal show the lands in question were annexed to the City of Calgary on issue of B.P.U.C. Order No. 20027, dated June 4, 1957; that the said lands were assessed by the Respondent Municipality for taxation in the year 1968 on authority of The Municipal Taxation Act without regard to the restrictive conditions set out in B.P.U.C. Order No. 20027;

that prior to October 31, 1967 sewer and water lines had been installed along parts of the boundaries of each parcel of land and the said lines were open to connection in respect of each parcel.

On hearing the Appellant's contention that Block A, Plan 2795 G.T. is assessed for acreage held by the city as roadway, the Board agreed that a title search should be made of the parcel. To this end the Respondent now advises that the parcel contains only 13.39 acres and recommends the assessment, on this ground alone, be reduced from \$52,630.00 to \$45,530.00. Needless to say the Board will, in the face of the submissions tendered, adjust the assessable acreage to 13.39 in respect of the said parcel of land.

In this joint appeal Counsel for the Appellant argues that the decision of Greschuk J. in the case Anulin Farms Limited v. City of Calgary, dated February 19, 1959 (not reported) serves as a precedent to show the property in question falls liable to assessment under the provisions of condition 5 of B.P.U.C. Order No. 20027. To the converse Counsel for the Respondent refers to the case Engineered Buildings Limited v. City of Calgary W.W.R. Volume 56 (1966) and argues that this case, notwithstanding the decision of Greschuk J. in the case Anjulin Farms Limited v. City of Calgary, clearly supports the contention that when sewer and water have been made available to a parcel of land, condition 5 of B.P.U.C. Order No. 20027 has no further application.

The main issue raised in this appeal is simply whether the Appellants' lands fall subject to assessment under condition 5 of B.P.U.C. Order No. 20027, or the relevant provisions of The Municipal Taxation Act. In answering this question it is, at the outset, necessary to refer to the said Order No. 20027 and in particular to conditions 5 and 9 which read as follows:

"5. It is further ordered that any parcel of land in the areas annexed by this Order from which an owner or tenant does not derive an income sufficient to provide his principal livelihood from the production of crops, livestock, fur production, bee-keeping, hog ranching or any of them, shall be assessed and taxed as follows:

(a) that portion of such parcel on which the dwelling house and other improvements are located together with a reasonable yard area, shall be assessed and taxed as a residential lot, having due regard to urban services available thereto;

(b) the remainder of such parcel as farm lands.

Such parcels shall be taxed by applying thereto the current mill rate of the City."

"9. All of the foregoing is subject to the general condition that, exclusive of any rate necessary to raise the cost of local improvements abutting any parcels of land in the said area, the taxes charged in respect of parcels of land in the said area to which the City has not made water and sewer available will not represent an increase over the taxes that the parcel would be liable for had the area remained in the Municipal District. As soon as the City has made water and sewer available to any parcel of land within the said area then normal City taxes, subject to the foregoing conditions, will apply to that "

" parcel. In determining for the year 1957 the taxes that would have been paid had the parcel in question remained in the Municipal District the 1957 reassessment will be used."

On considering this matter it is of paramount importance to note that the evidence received clearly establishes that prior to the date for assessment, namely October 31, 1967, water and sewer lines were installed along parts of the boundaries of the parcels of land in question and these services could have been employed by the Appellants in respect of either parcel of land. With this fact in mind the Board, on study of clause 9 of B.P.U.C. Order No. 20027, notes the requirements extend only to making sewer and water available to the parcel. The word "parcel" is employed throughout the entire Order in the sense that it is all inclusive of the land within a single legal description and does not refer specifically to a strip of land abutting sewer and water lines or to, say, L.S.D. 6 as opposed to L.S.D. 16 in a given quarter section. Therefore, the Board is firmly of the opinion that sewer and water had in fact been made available to each of the parcels of land in question prior to October 31, 1967.

Whether these parcels of land, having had sewer and water made available to them, fall liable to assessment under the provisions of The Municipal Taxation Act, the Board feels it must be guided by the words of Cairns J.A., delivered in the Supreme Court of Alberta, Appellate Division, in the case Engineered Buildings Limited v. City of Calgary (supra) wherein at page 283 he states as follows:

"I particularly draw attention to condition 9, which provides that as soon as the city has made water and sewer available to any parcel of land within the said area, the normal city taxes will apply. Whether this has occurred is a question of fact on which no appeal lies to this court. The Alberta Assessment Appeal Board, from whose order this certiorari was taken before Dechene, J., found as a fact that sewer and water had been supplied. It follows, therefore, that even if condition 5 did at one time apply, it no longer applies, and we must therefore ascertain what normal city taxes were, and to do so we return to sec. 458 (9) and (10), of which I have already indicated the proper interpretation."

It is perhaps questionable whether the learned judge expressed the above statement as a finding of the court or whether it should be considered as a statement made in obiter, but it appears to the Board that before saying the provisions of Section 458 (9) of The City Act prevailed, of which he had earlier indicated the proper interpretation, it was necessary to find that condition 5 of Annexation Order No. 20027 did not take precedence over section 458 (9) of The City Act. The facts here being the same, i.e., sewer and water having been made available to each parcel, the Board is of the firm opinion the Appellants' lands are correctly subject to assessment under authority of The Municipal Taxation Act and the relevant provisions thereof as opposed to condition 5 of B.P.U.C. Order No. 20027. It is noted that the case Anjulin Farms Limited v. City of Calgary is distinguishable from the case at hand, or of that of Engineered Buildings Limited v. City of Calgary, since evidence of fact showing that sewer and water had been made available to the parcel by the date for assessment, was not adduced. Therefore

the question raised here was not taken under consideration in the Anjulin Farms Limited case by either the Assessment Appeal Board or the learned Judge of the Supreme Court Trial Division.

It follows that in the opinion of the Board the Court of Revision was correct in finding the lands in question to be assessable under the provisions of The Municipal Taxation Act and this having been the procedure followed in making the assessments the only adjustment necessary is by way of correcting the acreage and the resultant assessment chargeable to Block A, Plan 2795 G.T. as previously indicated.

In the result of this joint appeal the land assessment made to Block 3, Plan 8539 G.J. will remain unchanged while the land described as Block A, Plan 2795 G.T. will be amended to show an assessable area of 13.39 acres and the assessment of the said land will be reduced from \$52,630.00 to \$45,530.00. It is so ordered.

No costs to either party.

(SIGNED) K. A. LUKE, CHAIRMAN,
ALBERTA ASSESSMENT APPEAL BOARD

DATED AT EDMONTON, in the Province of Alberta, this 17th
day of March, A.D. 1969.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

The Court:

The Honourable H. G. Johnson
 The Honourable E. W. S. Kane
 The Honourable C. W. Clement

IN THE MATTER OF THE EXPROPRIATION
 PROCEDURE ACT BEING CHAPTER 30 OF
 THE STATUTES OF ALBERTA, 1961, AND
 AMENDMENTS THERETO,

- and -

IN THE MATTER OF THE PUBLIC UTILITIES
 BOARD ACT, BEING CHAPTER 85 OF THE
 STATUTES OF ALBERTA, 1960, AND AMEND-
 MENTS THERETO,

- and -

IN THE MATTER OF AN APPEAL FROM A
 DECISION, BEING DECISION #28868, AND
 ORDER, BEING ORDER #28870, OF THE
 PUBLIC UTILITIES BOARD DATED THE 7th
 DAY OF OCTOBER, A.D. 1968 AWARDED
 COMPENSATION IN THE SUM OF \$6500.00
 PLUS INTEREST FOR AN EXPROPRIATION
 BY THE MUNICIPAL DISTRICT OF PINCHER
 CREEK NO. 9 FROM ALYRE A. THERRIAULT
 AND EDWIN B. THERRIAULT OF 81.62 ACRES
 MORE OR LESS IN THE SOUTHWEST QUARTER
 OF SECTION 27, TOWNSHIP 5, RANGE 29,
 WEST OF THE 4th MERIDIAN.

BETWEEN:

THE MUNICIPAL DISTRICT OF PINCHER CREEK
 NO. 9,

Applicant
 Respondent

- and -

ALYRE A. THERRIAULT and EDWIN B. THERRIAULT

Respondents
 Appellants

REASONS FOR JUDGMENT
 of The Honourable Mr. Justice Clement

With respect, I must express dissent from the
 opinion of my brother Kane that no weight could in any
 event be given to certain evidence rejected by the

Public Utilities Board, and in consequence that it is not necessary to decide the question of its admissibility. The evidence was of sales of other lands in the district to purchasers having statutory authority to expropriate.

The evidence is meagre, but seems to fall into two categories: sales from negotiations without the exercise of expropriating power, and settlements made after expropriation but before the amount of compensation had proceeded to arbitration. The Board drew no distinction between these categories and applied to both the passage from Challies:

Evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements made to avoid litigation, or of an amount offered and accepted in a previous expropriation later abandoned.

It further referred to a passage from the judgment of the Privy Council in *Re Raja Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam* (1939) A.C. 302, to wit:

The compensation must be determined, therefore, by reference to the price which a willing vendor must reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion.

and apparently drew the inference that the mere fact that the purchaser had expropriating powers so affected the result one way or the other that the sale prices could afford no evidence of value. I am of opinion that those passages do not support that inference, and that the Board erred in law in broadly stating

that it must rely on evidence stemming from sales of land other than sales to purchasers having authority to effect an expropriation.

The passage from Challies does not extend to evidence of sales resulting simply from negotiations without the exercise of expropriating power, nor do any of the auth-

orities upon which it is founded. It is desirable to examine them.

The earliest case cited in support of the passage is *The King v. Power* (1917) 34 D.L.R. 257 in the Exchequer Court of Canada. There, the Crown had filed an information to expropriate from the defendant a parcel of land, of which a portion had been the subject of earlier expropriation proceedings by the Crown when it then had offered the defendant \$42,597 for that portion. The offer had been accepted by the defendant, but the proceedings had been discontinued by the Crown and that portion of land had, reverted in the defendant. The relevant part of the judgment of Cassels J. is as follows:

Mr. Stuart claims this offer should be treated as conclusive of the value of that portion of the lands in question in this action. I do not agree with this contention. The officials of the Crown who made the valuation upon which the tender in the previous information was based were not called as witnesses and the offer may have been based on altogether erroneous information and basis as to value. The Crown discontinued that information and I have to determine the value on the evidence before me, of course not losing sight of the previous offer.

(The emphasis is mine).

This statement not only does not support the concluding words of the passage from Challies, but is contrary to them. It is plain that Cassels J. was prepared to take into account the earlier offer of the Crown on the earlier expropriation proceedings, and the ratio of his decision was that the price then offered was not conclusive of the value, but only an element that could be taken into account with other proper evidence of value.

Essentially the same view was expressed by the Appellate Division of the Supreme Court of Ontario in *Re Billings and Canadian Northern Ontario Railway Company* (1913) 29 O.L.R. 608, in which the issue was the amount of compensation payable by the railway company upon expropriation of land owned by Billings. Evidence was given of an earlier purchase of other land by the railway

from Billings, and on this the court said:

The price paid by the respondents to C. M. Billings of \$1,425 per acre for lands contiguous to the Canadian Pacific Railway, while that price includes damages caused by the operation of the respondent's railway alongside his property, cannot be disregarded, and is a direct piece of evidence as to value.

This view was restated by the same court in its later judgment in *Re Evans and Canadian Pacific Railway Company* (1926-27) 31 O.W.N. 389, where Masten J.A. for the court said that

the railway company appealed upon the ground, among other grounds, that evidence of settlements made by the company in respect of other lands in the same vicinity was inadmissible and should have been rejected by the arbitrators. The evidence was admissible for what it was worth.

The judgment then refers to *Re Billings and Canadian Northern Ontario Railway Company* (supra) and other decisions and goes on to say:

The weight to be attached to such evidence when admitted is quite another question: It was recently discussed in this court in *Re Lennox and The Toronto Board of Education* (1926) 58 O.L.R. 427 at pages 432, 442.

To the latter might be added the compendious statement made in *Halsbury 3rd Edition*, Volume 10, page 113 on the authority of *Remnant v. London County Council* (1952) 3 P. & C.R. 185:

Where the comparable sales take place in circumstances in which compulsory powers are available, evidence of those sales should be received with caution.

I accept the principle of the foregoing cases as applicable to both categories of the evidence in question. It is not affected by the observation made by the learned President of the Exchequer Court in *The King v. W. D. Morris Realty Limited* (1943) Ex. C.R. 141:

It is well established that an offer to buy the property made by the expropriating party for the purpose of avoiding controversy and

litigation is not a fair test of its market value, nor is an offer to sell it made by the owner for the same purpose to be regarded as an admission by him as to its value.

The circumstances therein postulated are far different from normal bargaining, the results of which might well have some probative value.

In a later case, *The King v. Eastern Trust Company* (1945) Ex. C.R. 115, the learned President further said:

I ruled that evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements in such proceedings made with a view to avoiding litigation. The latter portion of the rule is well established and is dealt with in the *W. D. Morris Realty Limited* case where I held that an offer to buy property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell property made by the owner for the same purpose to be regarded as an admission by him as to its value. There is also a sound basis for the former part of the rule. Sales from willing vendors, not obliged to sell, to willing purchasers, not obliged to buy, go to establish market value. An award in expropriation proceedings is a different thing. It is the result of the court's finding based on the evidence before the court in that particular case and cannot be used as proof of market value in another case. Each case must stand on its own facts and evidence as to market value.

Here again, these observations do not affect the principle under discussion, and I have set them out only to demonstrate that this is so. I reserve for consideration when it arises whether evidence can or cannot be given of awards made in other expropriation proceedings, as another point of view could be urged. An award in expropriation proceedings is the determination by a competent tribunal of the amount that a willing purchaser would pay to a willing vendor for the expropriated property, to use the language of the learned President. It represents the amount which the tribunal considers the parties ought to have agreed upon in accordance with

the established principles of compensation. If the expropriated property in respect of which an award has been made, is sufficiently comparable with the property under consideration, it may be that the amount of the award would have some evidentiary value.

The rejected evidence was of thirteen sales of lands some years ago ranging from four and one-half miles to thirteen miles distant, at prices ranging from \$105 to \$685 an acre. There is no evidence of the circumstances in which any of the sales were made, and the only evidence of comparability is that those lands were similar to the acreage under consideration, with the advantage of water supply by a river as compared to water supply to the acreage by a creek. I observe that of the six sales put in evidence by the witness Danielson, referred to by my brother Kane, those with good water supply commanded higher prices, ranging from \$108 to \$144 an acre. The closest of these, in one case four miles and in the other case five miles distant, sold respectively for \$125 and \$144 an acre: in both cases it seems apparent that the unspecified buildings thereon added little to the value. Taking into account all of the evidence given in the case to the extent that I feel is justified in the circumstances, I would award the sum of \$11,500 in compensation.

In other respects I concur in the judgment of my brother Kane.

"C. W. Clement"

J.A.

DATED at Edmonton, Alberta, this
25th day of January, 1971.

S. Denecky, Esq.,
Counsel for the appellants.

G. M. Morrison, Esq.,
Counsel for the respondent.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

The Court:

The Honourable the Chief Justice of Alberta
The Honourable Mr. Justice N. D. McDermid
The Honourable Mr. Justice C. W. Clement

BETWEEN:

DOME PETROLEUM LIMITED and PAN
AMERICAN CANADA OIL COMPANY LTD.

Respondents
Applicants

- and -

SWAN SWANSON HOLDINGS LTD., SWAN
SWANSON, DECEASED, ROBERT W.
SWANSON, JOHN N. SWANSON, GEORGE
W. SWANSON, DECEASED

Appellants
Respondents

REASONS FOR JUDGMENT

of The Honourable Mr. Justice Clement

This is an appeal by Swan Swanson Holdings Ltd. et al (hereafter together referred to as Swanson) from Decision number 29729 of the Public Utilities Board dated February 10th, 1970, and from its resulting interim orders number 29730 and 29731. The proceedings leading to this appeal are a sequel to the decision of this court in proceedings between the same parties, and in respect of the same pipeline and the same lands, on appeal from the judgment of Sinclair J. at trial, and reported as Dome Petroleum Limited and Pan American Canada Oil Company Limited v. Swan Swanson Holdings Limited et al (1970) 72 WWR 6. The respondents are hereafter together referred to as Dome. At the hearing Pembina Pipeline Limited and Trans-Mountain Oil Pipeline Company appeared by counsel to establish their interests.

On August 28th, 1969 Dome had made applications to the Public Utilities Board (hereafter called the Board) under section 34 of The Expropriation Procedure Act for interim orders pursuant to section 36 of the Act granting an immediate right to enter a strip 50 feet in width across each of two parcels of land owned by Swanson for the purpose of constructing an oil line, and for orders pursuant to section 35 expropriating an interest in each 50 foot strip for the purpose of acquiring a right-of-way in which to construct and maintain a pipeline. Following a hearing, the Board made interim orders granting to Dome an immediate right to enter the 50 foot strip across each parcel for the purpose of constructing, operating and maintaining a pipeline. The earlier decision of this court quashed those two interim orders on the ground that the Board was in error in law in declining jurisdiction to determine the extent and area of the right-of-way required by Dome as necessary or essential for the purposes of its pipeline.

In this state of affairs, Dome again applied to the Board in January 1970 for interim orders under section 36 granting immediate right to enter the same 50 foot strip through each of the Swanson parcels for the purpose of constructing, maintaining and servicing an oil line. At the hearing, the Board declined to hear that part of the application relating to a right to enter for the purpose of construction, for the reason that permission to that end had been given by the interim orders which had been quashed and Dome had in the interval actually constructed the pipeline in this 50 foot strip. During the hearing, evidence was tendered, objections taken, and argument had, which led the Board to make the following rulings:

1. It has no jurisdiction to change the route or site of the pipeline applied for by Dome, and can consider only the rights and the land described in the application.

2. It has jurisdiction to differentiate between the width of the right-of-way necessary or essential for the construction of a pipeline, and the width necessary or essential for its subsequent maintenance and servicing.
3. It has jurisdiction to take into account the following matters in determining what width of right-of-way is necessary or essential for the purpose applied for:
 - (a) the proposed or actual location of the pipeline within the desired right-of-way.
 - (b) The presence of an existing right-of-way and the location of a pipeline or structure therein.
 - (c) The kind or nature of the land to be expropriated and the use that is being made of it by the owner.
 - (d) The costs of constructing and maintaining different kinds and sizes of pipelines over varying kinds of land.

It is these rulings recorded in Decision No. 29729, and matters related to them that are in appeal or cross-appeal according to the interests of the parties by leave granted under section 62 of The Public Utilities Board Act. In the result, the Board by its said interim orders granted a right to enter 35 feet of each of the 50 foot strips applied for, for the purpose of operating, maintaining and servicing the pipeline then in place.

Dome objects in law to the reduction to 35 feet in width of the right of entry it applied for: it urges that the dissenting judgment of Johnson J.A. in the earlier decision is correct, and that the majority judgment was given per incuriam in that it did not take into account sections 4 and 32 of The Expropriation Procedure Act and section 40 of The Pipeline Act 1958. I cannot accept this contention. Those sections were specifically discussed in the passages from the judgment of Sinclair J. at trial quoted by the majority judgment in considering the appeal therefrom. "Per incuriam" means "for want of

care" and is applicable when the court has overlooked a relevant statutory provision or other binding decision. It does not apply to a judgment in which the authorities urged by counsel are considered and the argument advanced on them is rejected. The conclusion may be wrong, if so determined by a higher court, but it is not per incuriam. Here, counsel for Dome urges that the minority judgment of Johnson J.A. (which, incidentally, does not refer to the sections mentioned of the two Acts) is right, and the majority judgment is wrong. It is apparent that the majority judgment took into account all of the relevant provisions of both Acts, including those mentioned, and interpreted their effect. Johnson J.A. came to a different interpretation. The decision of the majority was the decision of the court, and I can find no merit whatsoever in the argument that it was given per incuriam.

The main appeal by Swanson is that the Board erred in holding that it had no jurisdiction to change the route or site of the right-of-way applied for by Dome. This point was not determined in the earlier decision. For the purposes of this judgment I adopt the facts set out in the opinion of Allen J.A. and add thereto only such further as are necessary for this decision.

The application by Dome to the Department of Mines and Minerals for a permit to construct the pipeline was in statutory Form A, and was accompanied as required by a plan showing, amongst other things:

- (i) The proposed route of the pipeline colored in red.

Permit number 10051 dated May 13th, 1969 resulting therefrom was granted to Dome for an oil line

from a point in or about

The South West Quarter of Section 4,
Township 52, Range 24, West of the
4th Meridian

to a point in or about

The North West Quarter of Section 5,
Township 53, Range 23, West of the
4th Meridian

in accordance with the application of the said
company dated March 27th, 1969.

Subsequently, Permit number 10051 was amended as to the route but nothing turns on the amendment. The amended route plan shows the proposed route by a red line commencing near the south boundary of the South West Quarter of Township 52 at a point not determined by measurements, and following a course marked by some deflections and curves to a point not determined by measurements within the North West Quarter of Section 5, Township 53. In its course it crosses many parcels of land, as well as the two owned by Swanson which themselves are a substantial distance apart. For its entire length it is shown to be alongside one or more pipeline rights-of-way including those of Pembina Pipeline Limited and Trans-Mountain Oil Pipeline Company, and it crosses over one or more of the pipelines at several points, as well as streets and highways. No point of crossing is determined by measurements. Where it traverses one parcel of the Swanson land, it lies alongside a right-of-way 50 feet in width belonging to Pembina, which in itself is contiguous to a right-of-way 60 feet in width belonging to Trans-Mountain. A similar condition prevails where the route traverses the other Swanson parcel. The position in particular taken by Swanson is that some interest in a contiguous right-of-way, for example that of Pembina, could be expropriated to some extent for the purposes of Dome's application, and that this should be done in the interests of Swanson.

The plan required by statutory Form A does not do more than show the route along which the applicant wishes to construct its pipeline: it does not, nor does the scheme of The Pipeline Act 1958 require it to, define by precise description the lands in which interests could subsequently be expropriated under the author-

ity of section 40 of the Act. I am of opinion that the route in respect of which a permit is given under section 5 is a concept only, in relation to which powers of expropriation may be exercised by the permittee but only if the locations for which expropriation is sought fairly come within the concept of the route shown on the plan. This distinction between the conceptual proposed route, and the exact physical location of the pipeline to be determined by proceedings under The Expropriation Procedure Act, is supported by analogy to the differentiation made between a route and a highway by the Privy Council in *Kelani Motor Transit Company Limited v. Colombo-Ratnapur Omnibus Company Limited* (1946) AC 338 at 346:

A "highway" is the physical track along which an omnibus runs, whilst a "route" appears . . . to be an abstract conception of a line of travel between one terminus and another and to be something distinct from the highway traversed.

If the applicant should be more specific in his application and accompanying plan, and a permit were granted in the terms of the application, then by its own act the permittee would have placed restrictions or definitions on its power of expropriation. Without deciding the point, I would think that the Act does not contemplate the Department of Mines and Minerals, nor the Minister, on an application for a permit, making decisions on the details of location as distinct from the concept of the route, nor on the area or extent of the right-of-way that might be required for the purpose.

By section 40 of The Pipeline Act 1958

where an operator requires an interest in land for the purposes of his pipeline he may expropriate the interest required by an order under The Expropriation Procedure Act.

The initiative for expropriation lies solely with the permittee. When a permittee requires an interest in land for those purposes, it applies to the Board under section

34 of The Expropriation Procedure Act setting forth amongst other things a description of the land that it desires to expropriate and the purposes for which it desires the expropriation: it is not directed to set forth the interest therein that it requires. No other person is given any power to select the land along the route in which the pipeline is to be actually located, and no other land can be brought before the Board on which it can make an expropriation order. What the Board has to deal with is only the land desired to be expropriated by the applicant; and the description of this land will have been determined by survey made by the applicant under section 42 without the requirement of any licence, consent, approval or permit of anyone, and without any regard for the landowner except to give him notice and to make compensation for damage.

The applications with which we are here dealing are under section 36 of the Act by which the Board is empowered to make interim orders for the immediate exercise by the applicant

of all or any of the rights over the land for which the application has been made * * *

This is the specific land described pursuant to section 34 which the applicant desires to expropriate. It is all that is before the Board, and the section does not contemplate any determination whatsoever at that stage on any matters except the necessity of the company for immediate exercise of rights over that land, together with the amount of the deposit required as security for payment of compensation and costs. When an interim order is made giving a right to enter for the purpose of constructing a pipeline, and the pipeline is then constructed, it is not practical to propose, as is done here, that the Board could subsequently, on an application for expropriation under section 35, hear evidence that would lead it to conclude that the pipeline should be located at some other place in the interests of the landowner.

If such an inquiry could in law be made on an application under section 35, then it is suggested that it ought to be made on an application for an interim order under section 36 to avoid the possibility of an impractical result. The Board cannot make an expropriation for land that the permittee has not applied for, but it is said that the Board could, when the circumstances warrant it, deny the application and in effect require the applicant to re-apply for an interest in some other land, the expropriation of which would be less inimical to the landowner without unduly affecting the applicant. In my opinion the Board is not given jurisdiction to consider or weigh the interests of the landowner in relation to the desire of the applicant to expropriate specific land. On such an application the Board has to determine the estate or interest in the land which the applicant requires for the described purpose, since section 40 of The Pipeline Act 1958 entitles a permittee to expropriate only the "interest required". In conformity with the earlier decision, the real extent of the requirement for the purpose, whether fee simple or some lesser interest, must be determined. The Board has also to determine the width of right-of-way required for expropriation in conformity with the earlier decision. It then makes an order in which, amongst other things, it declares the estate or interest granted to the company and it describes the land to which that order of declaration relates. In none of this can I find any power on the part of the Board, either directly or indirectly, to go outside of the land which the applicant has expressed its desire to expropriate.

It is difficult for me to see how the scheme could work otherwise. As is disclosed in the present case, a pipeline traverses many parcels of diversely owned land through which it must maintain its continuity: the point of exit at the boundary of one parcel must coincide with the point of entry into the adjoining

parcel. The scheme of the Acts does not contemplate or permit landowners to cause a change in the point of entry into, or the point of exit from, their respective parcels, which would cause a chain reaction dislocating the projected placement of the pipeline to an extent that could only be speculated on when applications for expropriation are undertaken.

These views relieve the immediate concerns of Pembina and Trans-Mountain, but it is desirable to say a further word. Trans-Mountain was incorporated by special act of the Parliament of Canada, being Ch. 93 of the Statutes of Canada 1951 for the purpose of construction and operation of interprovincial pipelines, the holding of land and the exercising of powers, ancillary and incidental to the purposes and objects of the company. As such it is an interprovincial undertaking within section 92 (10)(a) of The British North America Act. By the provisions of The National Energy Board Act, Statutes of Canada 1959, Ch. 46, only the National Energy Board has jurisdiction in respect of the right-of-way for any undertaking of Trans-Mountain. In my opinion no provincial authority can be created effective to expropriate any property or interests of Trans-Mountain.

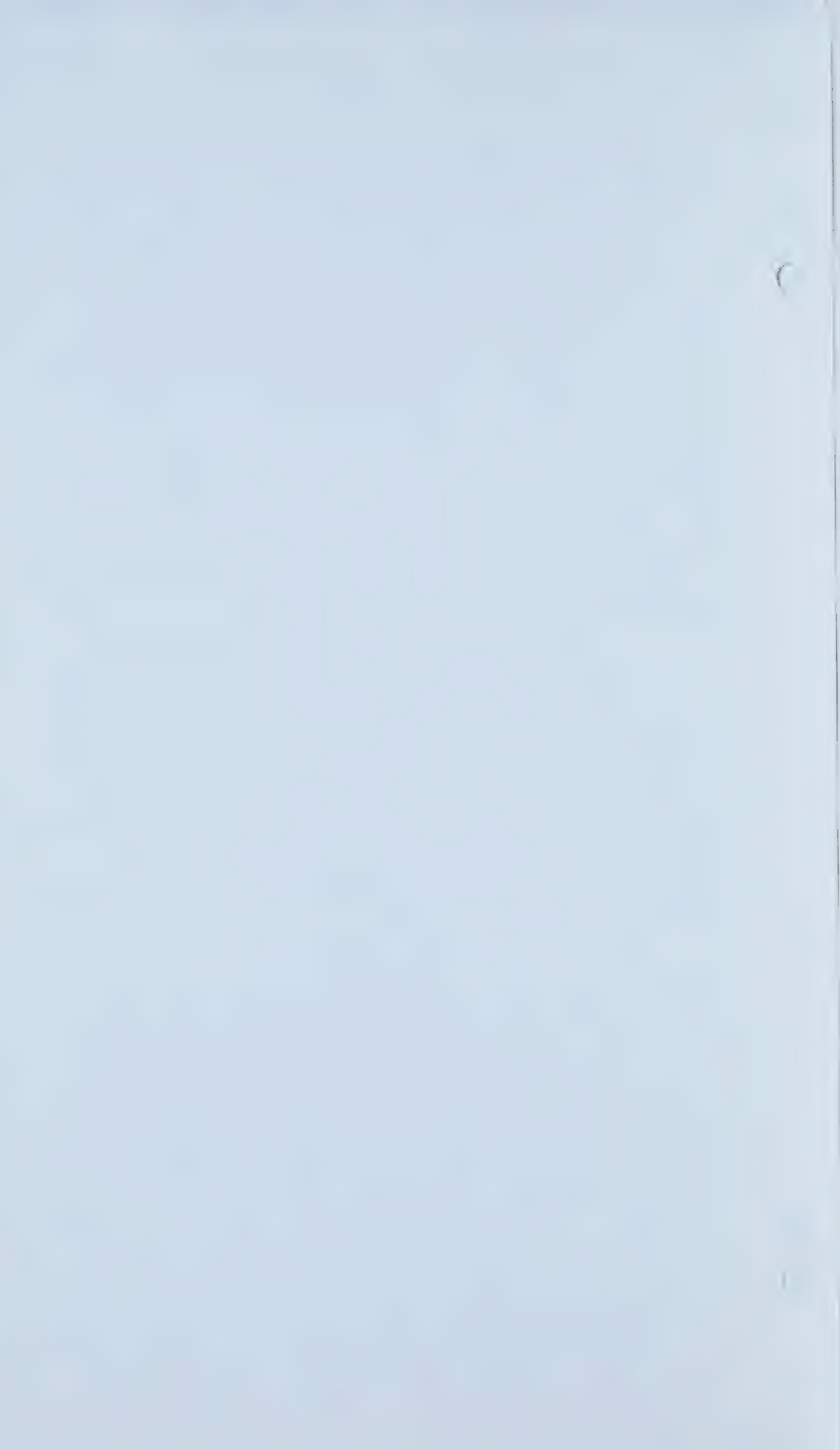
Pembina is in a different position. It is subject to provincial law, and its right-of-way appears to be crossed at least once by the route of the oil line of Dome under Permit 10051. I take it that its right-of-way was acquired by expropriation pursuant to the two Acts here under consideration whereby it acquired such interest in the land of its pipeline location as its order for expropriation determined. Section 40 (3) of The Pipeline Act 1958 provides in respect of an order under The Expropriation Procedure Act that

an order vests in the operator, unless otherwise provided in the order, an exclusive interest in the land described in the order for the purposes named therein, with such annexed rights in or over other land as may be specified in the order * * *

I am of opinion that the exclusive interest so vested operates primarily vis-a-vis the owner against whom the expropriation is made, but in any event I cannot attribute to such vesting a higher or more impregnable exclusiveness than that enjoyed by the holder of any other interest under The Land Titles Act whether fee simple or lesser. The exclusiveness of interest vested by such an order is, in my view, as subject to encroachment by further proceedings under that Act as is any other interest in land. If Dome should apply for expropriation of an interest in Pembina's right-of-way in order to provide the crossing contemplated by the route plan, then the Board would have to determine and declare the estate or interest therein to be granted to Dome pursuant to section 35 of the Act.

I should observe that there may be cases in which the right-of-way location selected by an applicant is so unreasonable in the circumstances, and the interests of the landowner are so unnecessarily and harshly affected, that a question may arise as to whether the power of expropriation is being exercised in good faith. Such a case could attract the application of other principles, and I reserve consideration of it for an occasion on which it arises.

Dome and Swanson contend, each from its own point of view, that in determining upon the width of 35 feet for right of entry for the purposes mentioned, the Board took into account matters of fact not proper for this purpose. I am of opinion that in determining the width of an easement on application under section 36 of The Expropriation Procedure Act, the Board can consider only the necessary or essential requirements of the applicant in respect of the purposes for which the grant is asked; what falls from that decision then becomes a matter of compensation. I observe that the Board had, by its orders that were subsequently quashed, determined that a width of 50 feet was necessary or essential for the purposes of construction, and by its orders now



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under appeal determined that 35 feet is sufficient for the purposes of maintenance and servicing. I think that such determinations come within the ratio of the earlier decision; and indeed that ratio may again be resorted to on an application for expropriation under section 35. On reviewing Decision number 29729, I conclude that the Board did not give effect to any improper considerations of fact in coming to its determination of a width of 35 feet. The necessary and essential requirements of the applicant may well be affected by costs of construction and maintenance having regard to the nature of the land to be expropriated as well, in my view, as by the intended location of the pipeline within the desired right-of-way and the presence of an existing right-of-way and the location of a pipeline or structure within it. I do not think that the use that is being made by the owner of the land desired to be expropriated is relevant, as that is more a matter for compensation; however, such use does not appear to have been taken into account by the Board in making its decision.

The course of proceedings leading to this appeal has created a bizarre situation. Dome has a pipeline in Swanson's property but without authority for it being there, yet the Board has granted a right of entry to maintain and service it. Nevertheless, Swanson does not assert a claim to ownership in the pipe: rather, it asserts in effect that the pipe should be ignored and the whole matter treated as if it had never been constructed. This is a rather difficult feat of imagination, whether for the Board or for this court; but it is unnecessary to embark on it in view of the opinions expressed above. In the result, I would dismiss the appeal of Swanson, with costs including costs of Pembina and Trans-Mountain; and I would also dismiss the appeal of Dome without costs, leaving it

to regularize the situation by an application for expropriation.

"C. W. Clement"
J.A.

DATED at Edmonton, Alberta, this
27th day of January, 1971.

D. G. Ingram, Esq.,
Counsel for appellants.

G. A. C. Steer, Esq., Q.C. and
D. R. Bailey, Esq.,
Counsel for Dome Petroleum Limited.

D. O. Sabey, Esq., and
R. J. Pitt, Esq.,
Counsel for Pembina Pipeline Limited.

P. M. Owen, Esq., Q.C., and
A. P. Blakey, Esq.,
Counsel for Trans-Mountain Oil Pipeline Company.



The Court:

The Honourable H. G. Johnson
The Honourable E. W. S. Kane
The Honourable C. W. Clement

IN THE MATTER OF THE EXPROPRIATION
PROCEDURE ACT BEING CHAPTER 30 OF
THE STATUTES OF ALBERTA, 1961, AND
AMENDMENTS THERETO,

- and -

IN THE MATTER OF THE PUBLIC UTILITIES
BOARD ACT, BEING CHAPTER 85 OF THE
STATUTES OF ALBERTA, 1960, AND AMEND-
MENTS THERETO,

- and -

IN THE MATTER OF AN APPEAL FROM A
DECISION, BEING DECISION #28868, AND
ORDER, BEING ORDER #28870, OF THE
PUBLIC UTILITIES BOARD DATED THE 7th
DAY OF OCTOBER, A.D. 1968 AWARDED
COMPENSATION IN THE SUM OF \$6500.00
PLUS INTEREST FOR AN EXPROPRIATION BY
THE MUNICIPAL DISTRICT OF PINCHER
CREEK NO. 9 FROM ALYRE A. THERRIAULT
AND EDWIN B. THERRIAULT OF 81.62 ACRES
MORE OR LESS IN THE SOUTHWEST QUARTER
OF SECTION 27, TOWNSHIP 5, RANGE 29,
WEST OF THE 4th MERIDIAN.

BETWEEN:

THE MUNICIPAL DISTRICT OF PINCHER CREEK
No. 9

Applicant
Respondent

- and -

ALYRE A. THERRIAULT and EDWIN B. THERRIAULT

Respondents
Appellants

Johnson, J.A. concurs

REASONS FOR JUDGMENT

of The Honourable Mr. Justice Kane

The appellants are brothers and at all times
material carried on a ranching business in partnership

near Pincher Creek. They were the owners of five and a half quarter sections of land. Out of one of the quarter sections the respondent, acting under the provisions of The Expropriation Procedure Act, Cap. 20, Alberta 1961, expropriated 81.62 acres. The effective date of the expropriation was January 11, 1967.

The parties could not agree upon the amount of compensation to be paid for the land. Proceedings were then taken by the respondent by way of application under section 28 of the Act to the Public Utilities Board for an order fixing the compensation to be paid for the land so expropriated. After a hearing, the Board fixed compensation at \$6,500 payable with interest at the rate of 7% per annum from January 11, 1967 until paid.

From that award the appellants appealed to the Appellate Division of the Supreme Court.

When the appeal came before the court, it appeared that in addition to the compensation for the land expropriated, there was pending a claim by the appellants for injurious affection caused by or arising out of the expropriation of the land to the remaining lands of the appellants.

The court then adjourned the hearing of the appeal from the award of compensation in order that the claim for injurious affection might be heard by the Public Utilities Board and with a view if there was an appeal from that award, that both appeals could be heard together. The claim for injurious affection was heard by the Board and an award made of \$2,500 for injurious affection. From that award the appellants also appealed. Both appeals were argued together. I shall first consider the appeal from the award of compensation for the land expropriation.

In such a case as the present one, this court has jurisdiction to act when the Board has proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact. (Re Brink (1965) 52 WWR 187; The King v. Elgin Realty Co. (1943) SCR 49;

Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corp. of Greater Winnipeg (1966) 55 DLR (2d) 600 at 602; Saint John Harbour Bridge Authority v. J. M. Driscoll Ltd. (1968) 68 DLR (2d) 502 at 505; University of Toronto v. Zeta Psi Elders Association of Toronto (1969) 2 DLR (3d) 625 at 627).

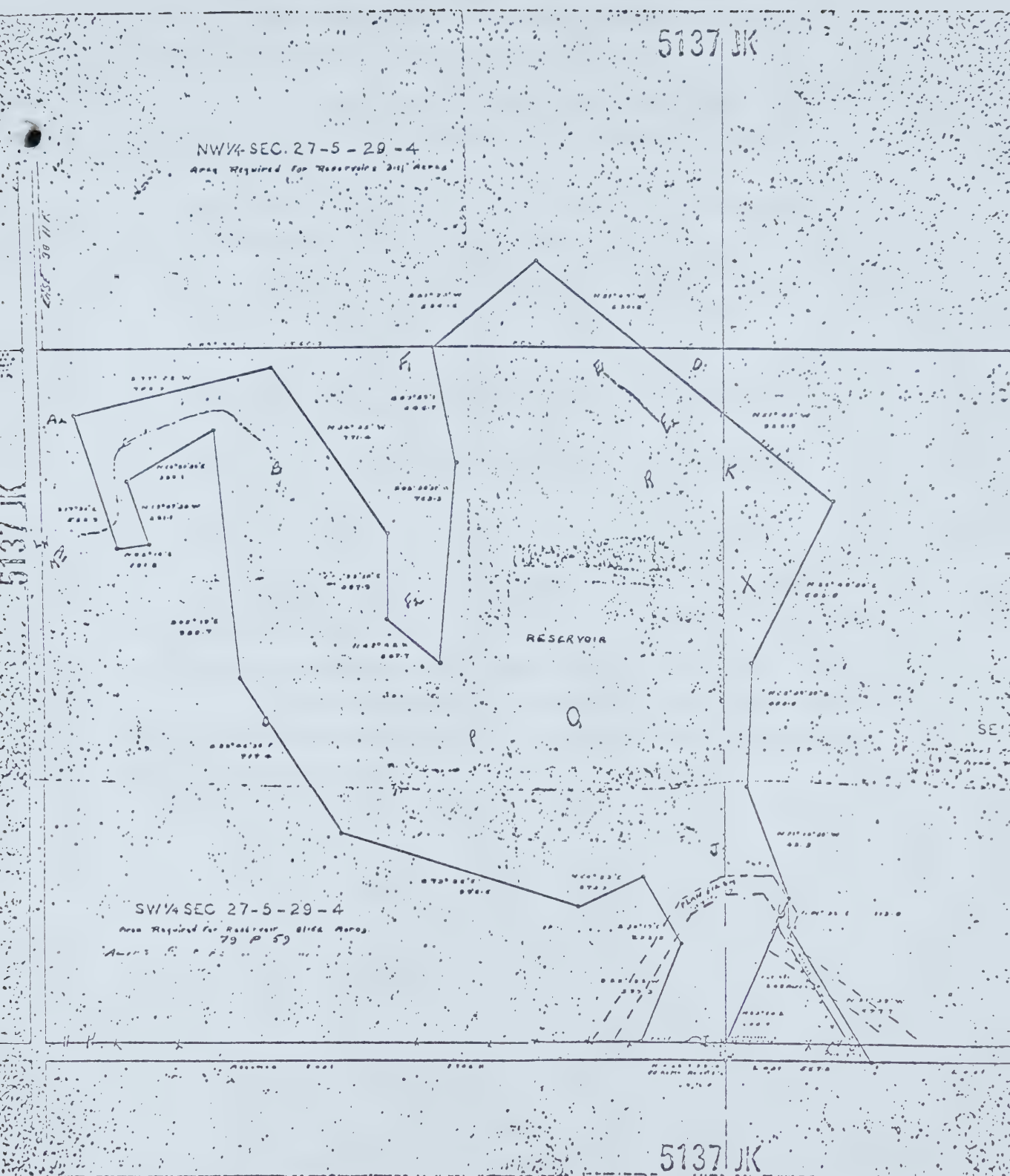
The amount of land expropriated was 81.62 acres more or less (which I shall refer to as the subject land) and it was taken out of land described as follows:

The South West Quarter of Section 27, Township 5, Range 29, West of the 4th Meridian, in the Province of Alberta, containing 160 acres more or less; excepting thereout 1.16 acres for a roadway as described on Plan 612 B.M. and reserving to the Calgary and Edmonton Corporation Limited all minerals including oil and natural gas as set out in Transfer 3040 E.K.

The land taken is unimproved. It is range land suitable for the business in which the appellants were engaged.

The reason for the taking was to dam a creek called the Indian Farm Creek which ran through the expropriated land, and to construct a water storage reservoir on the said land for the purpose of storing a supply of water for approximately fourteen livestock owners who live downstream on the creek. When the water was dammed up, the idea was to open the dam in the late fall and winter months to supply water for livestock.

I have had reproduced on small scale a copy of plan 5137 J.K. filed at the hearing. This shows the quarter section, the land expropriated therefrom, as well as land taken from certain other quarter sections.



The appellants' claim before the Board as compensation for the land taken was:

For the land - \$300 per acre
 For loss of gravel - \$10,000
 For loss of shelter - \$2,000

The lands owned by the appellants and upon which they conducted their ranching operations are set forth in the Board's decision as follows:

The South West Quarter of Section 27, Township 5, Range 29, West of the 4th Meridian (subject property);

The South West Quarter of Section 28, Township 5, Range 29, West of the 4th Meridian;

The North 80 acres of the North West Quarter of Section 21, Township 5, Range 29, West of the 4th Meridian;

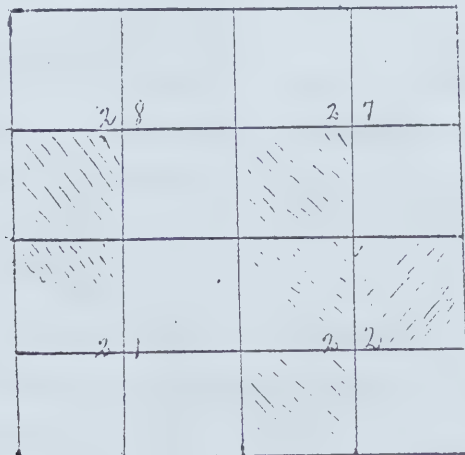
The North Half of Section 22, Township 5, Range 29, West of the 4th Meridian;

The South West Quarter of Section 22, Township 5, Range 29, West of the 4th Meridian;

This area amounts to 880 acres more or less.

It is my understanding that although the descriptions given make no reservation of mines and minerals, that we are concerned with surface only in these appeals.

In the decision, a diagram is set forth showing how the appellants' lands are located, which diagram is reproduced hereunder:



Alyre Therriault, one of the appellants, testified at the hearing before the Board. I shall summarize his evidence.

He had lived all his life in the Pincher Creek area. He was no longer living on his land. For the past three years he had lived in the Town of Pincher Creek.

He and his brother were engaged in partnership

in the business of ranching. They were the owners of five and a half quarter sections described above and those lands were used for the purpose of their business. In addition to such lands owned by them, they used a half section about 20 miles away from their own lands, rented yearly, a grazing permit, summer range, 22 miles away for 60 head of cattle, and they had one share in the Pincher Creek Grazing Corral about 10 miles away which permitted them to run 22 head of cows and calves in community pasture.

The subject land is about five and a half miles south of Pincher Creek and four and a half miles off the Waterton highway, about seven or eight miles northwest of what was referred to as the Waterton Dam. . It is across the road from the north half of section 22 above referred to.

The appellants purchased the subject land from an aunt in 1939 or 1940 for \$1,000. . At the same time they bought from her the 80 acre portion above referred to. . The remainder of the lands they owned they got from the estate of their father.

The subject land is rolling with a valley and the Indian Farm Creek running through the lower bottom. Vegetation consists of prairie wool or bunch grass, some trees at the bottom, willows, cottonwoods and poplar and lots of saskatoon and buffalo wool. . This vegetation at the time of the hearing was, of course, covered by the water in the reservoir.

This quarter section, Therriault said, was well suited to their operation being right in the unit within 15 minutes of their corral, across the road from their other lands, and accessible from home at any time. The appellants made use of it throughout the year, it being well suited for the animals, having water in the summer-time and enough brush and trees to shelter 75 animals in fly time.

The use made of it was for pasturing at any time it was needed, summer and winter, throughout the

year. The appellants had been running 20 to 30 head of cattle on the quarter section from time to time until the end of September, then pasturing horses there in the wintertime. When they wanted to move cattle, lots of times they would drop them at the quarter section for a day or so at a time, sometimes, 50, 60, up to 100 head. There were a few places on the quarter that had straight cutbanks, the rest of the slopes were good grazing land for cattle.

Some mention was made of a dug-out in the creek bottom on the land. Therriault said the appellants weren't taking any steps to keep it up because there always was water in it.

A neighbour whose land was situate a mile from the subject land had sold his land in June of 1967 at a price of \$135 an acre, Therriault testified. This land was mostly farm land; on one-half of the section there was a house, barn and other buildings, on the other an old house used as a granary. No particulars were given as to the amount under cultivation. Therriault said that having regard to the appellants' operation, the subject land was more suitable (and in answer to a question by his counsel as to why it would be more valuable than the neighbour's land said, "Because we are in the cattle, and it's got sure water on it, and shelter, plus shelter").

Therriault said he had heard of land in the area selling for \$300 per acre or more to the C.P.R. for right-of-way "to the plants". These I understand to be two processing plants near Pincher Creek owned by oil companies. He gave the names of five persons from whom he had received the information "just talking to them".

He also gave the names of four persons who, he said, had sold land to pipeline companies in the area at prices somewhere in the neighbourhood of \$375 per acre. Then he added that he understood the price of the railway land was from \$300 to \$500 per acre but that he had no proof.

Having regard to the nature of the operations

the appellants carried on, Therriault said that rather than lose the land that was being expropriated he would pay \$300 per acre for the land. That, he said, would be for the land, the trees, shelter and gravel. The appellants, he testified, received no benefit from the reservoir.

The evidence Therriault gave as to the gravel deposit on the subject land I shall endeavour to summarize.

About four years ago, Therriault with one Dalman, a foreman of the respondent, and one Elliott, went down to the land with a backhoe and dug certain holes. The operation took the better part of one half day. Holes were dug in different places, not in any specific pattern. Gravel was found in all of them in an area of five or six acres roughly. Some of the holes dug were 14 feet, as deep as a backhoe would go. This gravel, according to Dalman Therriault said, was suitable for road gravel. Therriault stated that his brother-in-law who lives four and a half miles from the lands in question, sells large quantities at 15¢ per yard to the Shell plant. Therriault said the gravel could be sold also to the respondent or to the C.P.R.

The appellants had not made any effort to sell gravel because they did not have the equipment that would be necessary to operate. No one had offered to buy gravel from them. Therriault did not think it would be difficult to get the gravel out of the subject land. No other evidence with respect to the presence of gravel on the subject land was adduced on behalf of the appellants.

George Ronald Liivam was called as a witness by the appellants. He was employed by a firm of farm consultants and had made an appraisal at the request of the appellants.

His evidence as to comparable sales was as to sales in the Waterton reservoir area which is in the neighbourhood of eight miles distant from the subject lands. He had not inspected himself any of the parcels of land which had been sold to the reservoir project but

had obtained information, he said, by making searches in the Land Titles Office.

The sales he referred to were as follows:

<u>Land Sold</u>	<u>Acreage</u>	<u>Price per acre</u>
Parcel 1	71.79	\$142
Parcel 2	64.09	\$220
Parcel 3	95.77	\$220
Parcel 4	16.59	\$307

These, he said, were parcels that had been obtained for a floodway on the Waterton Dam project.

He had not personally inspected any of the sites of these lands; said no improvements were indicated in aerial photographs. Taking what Liivam referred to as a comparison or comparative approach and looking at the partial taking of the quarter section and the irregularity of the land taken and the remaining lands which are partially severed and then asking what a prudent individual would sell his land for rather than be dispossessed, Liivam arrived at a figure of \$200 per acre.

In a report prepared by him and filed as an exhibit, Liivam estimated that the appellants were entitled to compensation of \$48,526.82. A summary of his figures is as follows:

Value of operation before taking:	\$120,000.00
Value of operation after taking:	<u>88,000.00</u>
Loss in value	32,000.00
Land residual	16,324.00
Interest 1 yr. & 3 months	1,224.30
Over taxation 1967 assessment	
\$9.00/acre, 57.5 mills; 10 months	<u>35.16</u>
	17,583.46

Consequential Damage:

Loss of Market Value	15,676.00	
Withdrawal of income on partially isolated areas	704.00	
Potential resources	10,875.00	
Incidental Damages	3,480.00	
Others	<u>208.36</u>	<u>30,943.36</u>
TOTAL		\$48,526.82

While he claimed he did not use the market approach, this approach to value is not helpful.

Liivam estimated the cost of building a shelter to replace the brush situated on the expropriated land at \$3,480, the potential resources (that is, the gravel) taking a minimum area of five acres and a depth of three yards, on the basis that there was a gravel deposit in the order of 72,500 yards of usable gravel, he estimated of a value of \$10,875.

His opinion was that the bare value of the land was \$200 per acre. He arrived at that figure by comparing the lands with others which I have heretofore referred to, being sales in the Waterton area.

Filed as an exhibit in respect of Liivam's evidence was a pamphlet entitled "Cattle Ranching in Southern Alberta", prepared by the Federal Department of Agriculture. Referring to it Liivam said that it appeared the minimum amount of land required to have a marginally successful operation was in the order of six to seven quarter sections.

Kenneth Eugene Phillips, secretary-treasurer of the respondent, testified that the respondent had offered to pay \$6,000 for the expropriated land. That figure, he said, was arrived at in accordance with a policy used in paying for land acquired for roadways, road widening and so forth. The starting figure was the assessed value, being in this case \$8 per acre. That figure was multiplied by three. To the resulting total of \$24 was added \$25. To that total of \$49 was added 50%, that is \$24.50, making a total of \$73.50 per acre or approximately \$6,000 for the 81.62 acres. The secretary-Treasurer said that the whole quarter section in question was pasture land and that the major portion of it being acquired by the respondent was "coulee, steep banks and so forth". He said he thought the offer made was a reasonable one.

Phillips was asked in cross-examination about the presence of gravel on the expropriated land. His evidence was to the effect that there is very little gravel in Township 5 and that the district was anxious to obtain supplies of it in the area. In about 1964 the respondent obtained a report from an engineering firm in the business of locating gravel as to where gravel might be found in

the township. That firm marked as possibly a doubtful location section 24. Following that, the respondent conducted auger and backhoe tests. The results of the tests indicated to the respondent that there was not a sufficient amount of gravel to warrant constructing a road in to haul gravel out or to develop it. Some of the test holes, Phillips said, flooded with water and pockets of sand were found with the gravel. He further stated he was quite sure if the supply had been worth developing the respondent would have been most anxious to remove the gravel because it was a scarce item in that particular locale. He denied that tests made by the respondent indicated that there was possibly five or six acres of gravel on the land that was flooded following expropriation.

Hugh Ferguson, reeve of the respondent, gave evidence. He is a rancher, his location being about six miles downstream from the subject land on the Indian Farm Creek. He described the land expropriated as a rough piece of coulee or ravine with a creek wandering through the bottom. The sides, on the northeast and possibly on the east, he said, were very steep. He agreed that the lands expropriated formed part of the appellants' economic unit. Asked about gravel on the land, he said that when work on the dam was starting some testing was done. He received a report from the foreman and backhoe man that indicated there was some gravel in small amounts, some of which could not be salvaged because of the presence of water; another factor was the small amount of gravel and the difficulty of getting gravel out.

In cross-examination Ferguson said that he had no personal knowledge of gravel deposits on the expropriated land but that before the dam was built he walked over the ground three or four times examining the pits and stated that had there been gravel there it would have been taken out because it would have been a benefit to the respondent provided enough had been found to justify the building of a road in to take it out.

Emil Arvid Danielson, an employee of the Royal Trust Company engaged full time on appraisal work for the past four years, was called by the respondent. His report described the property as a quarter section of 160 acres of native pasture land, cut up to a large extent by the meanderings of a small creek and some steep coulee banks; about 50 acres approximately of flat top land which could be broken for cultivation, but considering the general topography, stone and availability of water, the highest and best use might be considered as summer pasture. He appraised the market value of the quarter section at \$75 per acre. In his report he referred to six sales of land in the area. The information given in his report is as follows:

1. Patterson to Wagenaar
SE-16-6-30-W4th
Within two miles of the Town of Pincher Creek.
Some buildings of doubtful value.
160 acres--40 acres cultivated--120 acres grass.
Assessed at \$2310.00.
Reported sold by Auction late in 1967 at
\$14568.00 = \$91.00 acre.

2. Schmidt to Campbell	<u>Acres</u>	<u>Assessment</u>
SE-30-4-29-W4th	159.00	2150.00
SW-32-4-29- "	154.83	2130.00
NW-29-4-29- "	146.57	2000.00
SW-29-4-29- "	157.84	2690.00
NW-24-4-30- "	140.00	1230.00
Pt NE-24-4-30-"	3.00	10.00
	<u>761.24 acre</u>	<u>\$10210.00</u>

Good water

Excellent modern and large dwelling and fair set of outbuildings.

NW-24-4-30--pasture

Approximately 98 acres under cultivation.

Balance of 520 acres in hay.

Reported sold in July 1967 for \$83000.00=

\$108.00 acre average including improvements.

3. Kunkel to McRae
and Lewis
- | | | |
|----------------|------------------|-------------------|
| | <u>Acres</u> | <u>Assessment</u> |
| SW-1-6-30-W4th | 157 | 3210.00 |
| NW-1-6-30- " | 157 | 2850.00 |
| | <u>314 acres</u> | <u>\$6060.00</u> |

Good water

Buildings on the SW $\frac{1}{4}$ --fair

SW $\frac{1}{4}$ -127 acres cultivated--30 acres pasture

NW $\frac{1}{4}$ -84 acres cultivated--73 acres pasture

Reported sold in 1967

SW $\frac{1}{4}$ --with buildings \$130.00 acre

NW $\frac{1}{4}$ --with buildings \$100.00 acre

4. Gregorson Estate		
to D.G. Lewis	<u>Acres</u>	<u>Assessment</u>
NE-30-7-29-W4th	160	1740.00
SW-31-7-29- "	160	1950.00
	320 acres	3690.00

Reported sold in 1967 for \$25000.00=\$80.00
acre.

5. Hochstein to		
Bonertz	<u>Acres</u>	<u>Assessment</u>
NE-26-5-30-W4th	157	\$3940.00
SE-26-5-30- "	157	3170.00.
SW-25-5-30- "	157	2920.00
	471 acres	\$10030.00

Creek water
Fair buildings
412 - acres under cultivation
59 acres pasture
Reported sold in 1966-67 at \$125.00 an acre.

6. Otto Sarge to Bonertz		
NW-35-5-30-W4th	160	3990.00
SE-35-5-30- "	157	4020.00
	317 acres	\$8010.00

Good water supply
Some buildings
295 acres under cultivation
22 acres pasture
Reported sold in 1965 at \$125.00 acre
Adjusted for time plus 15%=\$144.00 acre.

In referring to these sales during his testimony, Mr. Danielson also said:

"In sale No. 1, I received that information for the municipality and from the auctioneer who handled the sale. In sale No. 2, I received the information from the purchaser. Sales No. 3, 4, and 6, information for these sales was received from a local realtor in Pincher Creek, who had listings, or was aware of the terms for which they sold. Sale No. 5, I discussed with Mr. Hockstein."

"Now, it was not possible in sales 3, 4, and 5 to contact the purchasers personally, and in one instance when they were contacted by phone, being on a party line the information I received was pretty sketchy, and not reliable. So, as I say, a great deal of effort, a great deal of my final opinion of value has been based on the relationship between the assessed values of these properties sold and the assessed value of the subject property."

These lands are respectively distant from the

subject lands of approximately

As to Sale No. 1 - 10 miles
Sale No. 2 - 7 miles
Sale No. 3 - 6 miles
Sale No. 4 - 20 miles
Sales Nos.
5 & 6 - 4 to 5 miles

Following the hearing, the Board found that the appellants had not established the existence of gravel on the land in merchantable quantities and rejected the claim for compensation for loss of gravel.

It stated it very much doubted that the shelter afforded along the creek would have a value in the amount claimed by the appellants, particularly when the steepness of the banks and its restricted accessibility were taken into account. The claim was rejected.

In determining compensation for the land actually taken, the Board considered it must rely upon evidence stemming from sale of lands other than sales to purchasers having authority to expropriate. (Such authorities would be the Canadian Pacific Railway Company and the two pipeline companies). The Board then, having regard to the nature of the operations carried on by the appellants, fixed the amount of compensation at \$6,500.

As pointed out in the cases cited earlier in this judgment, this court has jurisdiction to interfere with the award if the Board has proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact.

At the beginning of the appeal, counsel for the appellants contended that the Board had erred in obtaining and examining in the absence and without the knowledge of counsel, certain unidentified undated aerial photographs and relying upon these in arriving at its decision. It was argued that by doing so, the Board was relying upon its own evidence in reaching its decision, that the appellants were denied the right of cross-examining or commenting upon the evidence, that there was a denial of natural justice and that the Board exceeded its jurisdiction.

The Public Utilities Board Act, Cap. 85 Alberta 1960, provides by sections 32 and 33:

32. The Board may in its discretion accept and act upon evidence by affidavit or written affirmation, or by the report of any officer or engineer appointed by it, or obtained in such other manner as it may deem proper.

33. All hearings and investigations before the Board shall be governed by rules which may be adopted by the Board, and in the conduct of hearings and investigations before it the Board is not bound by the technical rules of legal evidence.

At the hearing, as set out in the decision of the Board, there was filed as part of one exhibit an aerial photograph which showed the Indian Farm Creek wandering through the quarter section from which the land was expropriated and on the sides of that creek there appeared to be some tree and brush growth.

What the Board apparently did, as also set out in the decision, was to examine with the aid of a stereoscopic apparatus prints of other aerial photographs of the quarter section taken before the damming up and the flooding. The decision stated that the growth along the creek confirmed its earlier observations of various spots on which the growth occurred indicating that it did not appear along the entire length of the creek and that the type of growth exhibited by the photograph (and I would understand this to mean the photograph filed as a part of the exhibit) appeared to be short brush growth with some interspersions of a number of small trees.

In view of the sections of the Act to which I have referred and that the prints examined by the Board after the hearing simply confirmed its earlier observations, I do not think that it can be said that in the circumstances of this case, the Board's action constituted a denial of natural justice to the appellants.

I do not think it can be said that, in the matter of shelter to animals on the land, the Board has

overlooked or misapprehended some material evidence of fact. What it has done is, on conflicting evidence, to make a finding as it is entitled to do, and this court would not be entitled to substitute its opinion for that of the Board. Similarly, the finding that the existence of gravel in merchantable quantities on the expropriated lands had not been established cannot, in my view, be disturbed.

Then it was urged that the Board erred because it considered that it must rely upon evidence stemming from sales of land in the area other than sales to purchasers having authority to expropriate, that accordingly it could not consider the evidence given by Therriault on amounts paid by the railway company for rights-of-way or the evidence given as to amounts paid in the Waterton Dam project area.

If such evidence is ever to be used (and on this I express no opinion) it must include all of the facts that went into each transaction. In the present case the evidence is sketchy and lacks detail and is not evidence to which any weight would attach.

It was pointed out by my brother Johnson J.A. in *City of Edmonton v. D & K Ranches Ltd.* (1968) 63 WWR 452, that in the majority of cases value to the owner will be represented by fair market value but that in certain cases market value will be inadequate to reflect the true value to the owner. Johnson J.A. quoted the following passage from the judgment of Duff J. (as he then was) in *Lake Erie & Nor.Ry. v. Brantford Golf & Country Club* (1917) 32 D.L.R. 219 at 229, which was quoted by Rinfret J. (as he then was) speaking for the court in *Woods Mfg. Co. v. Reg.* (1951) SCR 504 at 507:

"It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on

"upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Association v. Minister* (1914) AC 1083, at 1088 (Aus.) has given what he describes as a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it."

Then in *Gagetown Lumber Co., Ltd. v. The Queen et al* (1957) SCR 44, Rand J. said at page 51:

"Market value, that is, the price on which a prudent and willing vendor and a similar purchaser would agree, may be the sole determinant, exhausting compensation, but it may not be. Where the position of the owner vis-a-vis the land is not different from that of any purchaser, that value is the measure; where the owner is in special relations to the land, as in the case of an established business, the measure is the value to him as a prudent man, what he would pay, as the price of the land, rather than be dispossessed, that price thereafter, in effect, representing the capital cost of the business to which the profits would be related."

In the same case, Locke J. said at page 62:

"In determining the value to the owner, all advantages which the land possesses, present or future, in his hands are to be taken into consideration, and he is entitled to have the price assessed in reference to those advantages which will give the land the greatest value."

The evidence of sales in the neighbourhood which the Board considered, were the six sales of farm lands referred to in the evidence of Danielson at prices ranging from \$80 to \$144 per acre, and that referred to by Therriault being of a neighbour's land at \$135 per acre. These were sales of farm lands with, in each case, improvements, as I understand.

Danielson gave his estimate of the market value

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of the quarter section out of which the land was expropriated as \$75 per acre. Liivam had estimated the market value at \$200 per acre. The award of the Board was \$6,500 which is approximately \$80 per acre for the land taken.

This, it will be noted, is approximately \$5 per acre more than its market value as estimated by the appraiser produced by the respondent.

In my opinion, in coming to this award, the Board must have overlooked the fact that the land was a part of the lands used by the appellants in carrying on their business, well suited to that business with a source of water supply for at least most of the year, and that the selling price of it in the open market would not properly compensate the appellants for the loss of it. Whilst the appellants did not tender evidence as to the prosperity of the business, it can I think be inferred, that it was in a reasonably prosperous condition.

This, in my opinion, is an error in principle and accordingly this court may act to correct the error. I may add that I think this is a case in which this court has jurisdiction to interfere on the question of quantum where it is satisfied, as I am, that the amount allowed is clearly too small. (Trudel v. The King (1914) 49 SCR 501; Canadian National Railway Co. v. Harricana Gold Mine Inc. 1939 (1943) SCR 382).

Using the best judgment I can I would increase the award of compensation for the land expropriated to \$9,500 with interest as aforesaid.

The appellants' claim for compensation for injurious affection caused by or arising out of the expropriation of the 81.62 acres, as the claim was filed, was for \$48,299, with interest at 8%, particulars being

1. DEPRECIATION OF INCOME on Economic Agricultural Unit

Expropriation has forced a reduction in cattle herd of 20 cows with calves. Loss of net income of \$90.00 per

head over two year period (\$900.00 annually) capitalized
at 5% equals \$18,000.00

Less: Award for Expropriated
Land 6,500.00
11,500.00

Add: Non-utilization of \$8.00
per cow unit overhead in-
vested in equipment and
improvements
\$8.00 x 20 head = \$160.00
\$160.00 capitalized at 5% 3,200.00
14,700.00

Less: Proceeds of sale of
cattle sold 4,000.00
10,700.00 10,700.00

Planned further reduction of herd
by 20 head to avoid dedication of
farm land to pasture or loss of
income from farm land if dedicated
\$18,000.00 less income from sale
of cattle \$4,000.00 14,000.00

2. Decrease in market value of
unexpropriated portions of S.W. $\frac{1}{4}$
Sec. 27-5-29-W of 4th
70.38 acres @ \$50.00 per acre 3,919.00
3. Increased cost of operation in handling
cattle due to isolated, partially iso-
lated and irregular shaped areas
\$300.00 per year capitalized at 5% 6,000.00
4. Estimated cost of Insurance against
risk of cattle drowning in Reservoir.
Average of 20 @ \$200.00 per head at
\$1.50 per \$100.00
Insurance = \$60.00 annually
\$60.00 capitalized at 5% 1,200.00
5. Damages, clean-up costs and nuisance,
due to trespass by Public.
\$100.00 per year capitalized at 5% 2,000.00
6. Cost of shelter to replace natural
brush cover flooded by water 3,480.00
7. Costs and value of time incidental
to expropriation 2,000.00

Allowance for Disturbance Nuisance
and personal loss by way of relation-
ship with neighbors and Municipal
District 5,000.00
\$48,299.00

At the hearing Alyre A. Therriault stated that the amount asked for was \$24,000 with interest at 9%.

During the hearing it was suggested in evidence that the respondent might not fence the expropriated land and might allow it, as to whatever portion was not flooded, to be used by the appellants for their purposes, by renting such portions to them at a nominal rent.

In my opinion, in considering what amount, if any, the appellants are entitled to because of injurious affection, the question whether or not the land will be fenced and the question also whether or not the unflooded portions will be rented to the appellants, has nothing to do with it.

By reason of the expropriation the appellants have ceased to be owners of the land. They have lost it. Whether or not they may be permitted to rent it is something completely apart. Accordingly, so far as this appeal is concerned, we must proceed on the basis that the land is gone and that the appellants have no more right to use it for any purpose than any other member of the public.

That being so, it is not necessary to consider loss of access to the expropriated lands, but just as to parcel "D" above referred to. At the hearing before the Board it was informed the area of this parcel was between five and seven acres. Following the hearing of this appeal, counsel for the parties have informed us that the area is .87 of an acre.

George R. Liivam, an agricultural consultant with a Master's degree in Agricultural Engineering and a member of the Alberta Institute of Agrologists, was a witness called by the appellants. He testified that the appellants ran a good operation. He gave it as his opinion that the loss of the expropriated portion out of the five and a half quarter sections owned by the appellants could definitely change the ranching or farming and ranching enterprise from what would be an economical unit to one that was sub-economical. He had prepared a case report on the effect of the withdrawal of the

portion of the ranching enterprise under the following heads:

- Deleterious Effect of the withdrawal of 31.67 acres on the ranching enterprise:
- (1) Reduction by 20 head breeding stock.
 - (2) Renting pasture for further 20 head at an increased rate.
 - (3) Conversion of 50 acres cereal crop-land to hay and forage production.
 - (4) Access to remaining land impeded.
 - (5) Imbalance in grazing the remainder.
 - (6) Reduced market value of the remainder.

Liivam's final figure of estimated loss using this approach was in the neighbourhood of \$30,535. Using a second approach, his report was as follows:

The Therriault Farm and Ranch Unit is assumed to have been rendered uneconomic by the withdrawal. Therefore the remainder holding is open to purchase on a captive market. Neighboring holdings will be expanded by purchases of the property remaining to the Therriault Brothers. Because the adjoining ranches have complete homes and outbuildings, it is obvious that the improvements on the Therriault holding will receive very little consideration in the purchase price offered. The injury to the operation is found therefore as follows:

(1)	Value of the improvements	\$36,370
(2)	Less value of the house	<u>15,000</u>
		21,370
(3)	Lessened market value of the remainder land on the SW 27-5-29-W 4 Mer	3,135
(4)	Incidental costs	2,000
(5)	Others	
Total as to items (1) to (4)		<u>\$26,505</u>

The first approach, he stated, was the more obvious method of determining injurious affection. The latter approach, he stated will be more evident after a few more years operation.

The trend, he suggested, was toward an increase in the size of ranches in the area. He had not found any sales that reflected a reduction in size whilst the operators were still in operation.

I would understand that an agrologist is a specialist in the branch of agriculture dealing with soils, especially in relation to crops.

As will have been noted, at the hearing on the question of compensation to be awarded for the land expropriated, Liivam gave evidence of information he had obtained by making searches at the Land Titles Office at Calgary.

At the hearing on the question of injurious affection, Liivam, as an appendix to his case report on injurious affection, gave further information he had obtained as a result of other searches he had made at the Land Titles Office. This information he said he had brought along and entered as part of his report - "evidence as to the compensation paid between the property owners and the Canadian Pacific Railway and between the property owners and the Waterton or the P.F.R.A." This, I would understand, was as to lands used for railway purposes and in connection with the Waterton Dam and reservoir respectively.

Insofar as his searches related to additional payment for injurious affection, three cases were referred to by Liivam:

(a) In one case 14.04 acres were transferred to the railway company for a consideration of \$5,237.50 apportioned -

Land.....	\$2,115.00
Inconvenience, destruction of crop, loss and damage occasioned by construction of railway.....	<u>3,122.50</u>
Total.....	\$5,237.50

(b) In one case 15.49 acres were transferred to the railway company for a consideration of \$7,449.00, apportioned -

Land.....	\$2,323.50
Injurious affection.....	<u>5,125.50</u>
Total.....	\$7,449.00

(c) In one case 8.72 acres were transferred to the railway company for a consideration of \$5,029.50,

apportioned -

Land.....	\$1,308.00
Injurious affection.....	<u>3,721.50</u>
Total.....	\$5,029.50

No evidence was given as to why such amounts were paid for injurious affection. Lacking such, it is my opinion that this information so gathered from searches made at the Land Titles Office could not form a basis that would assist the Board in arriving at a decision on the point.

The Board found that while Liivam might qualify as an expert in certain fields of agriculture, he did not qualify as an expert either as a land appraiser or experienced real estate agent. The Board accordingly rejected all his opinions in that regard and particularly the opinions expressed in the second approach.

Henry A. Allum, a graduate appraiser, Appraisers' Institute, was called as a witness by the Respondent. In estimating loss to the appellants he used two approaches. The first approach assumed that the expropriated land would not be fenced off and that the appellants would be allowed to continue to use it. On this approach Allum calculated the appellants would not only benefit from the lake which resulted from damming the creek, but would also have use of part of the expropriated land comprising 46.62 acres. His calculation was as follows:

Total acreage before taking		880 acres
Taking	81.62 acres	
Less: Road Allowance	4.00 "	
Use of land not fenced	<u>46.62</u> "	
	31.00	<u>31</u> "
Remaining land		849 "

Allum then concluded that the only loss of pasture would be 31 acres because 50.62 acres would be available for use. In so far as the expropriated land is concerned, I have pointed out earlier in this judgment that that land, the whole 81.62 acres, was lost to the appellants because it was expropriated and the consent

to the use of this expropriated portion by the appellants can be withdrawn at any time.

As to the reference to the four acres to the road allowance, this I understand is the land in the road allowance outside the borders of the South West of 27 which apparently the appellants had been using for their purposes. Such a road allowance has, of course, nothing to do with the matter of land either lost to the appellants or in any manner gained to the appellants so far as these proceedings are concerned.

Using a second approach, assuming that the expropriated land be fenced off, Allum estimated loss at \$2,045. He agreed that the portion referred to as "D" is completely isolated but I do not understand that in the calculation above set out any reference is made to that fact.

Alyre A. Therriault in his testimony said that there was not land available in the area to replace the expropriated land; that whatever land was available would be "a unit, the whole set-up". I would understand from his testimony that if land was available the price of it would be very high. He had considered endeavouring to replace the lost land with rented land but found that he would have to pay \$5 per cow per month for such rented land which he thought was too high.

The Board made findings as to each of the items set forth in the claim as filed by the appellants.

(1) It was not satisfied that the appellants had been obliged to sell 20 head of cows because of the expropriation. There was evidence that 20 cows were sold to a brother-in-law but not that they were sold at other than a fair market price.

As to the claim that a further reduction in size of the appellants' herd was necessitated, Alyre A. Therriault when asked about the statement in the notice of claim indicating a plan to reduce a further twenty animals, said that the appellants "might" so further reduce. Asked if there was anything definite yet, he

answered "No".

I agree with this finding of the Board.

(2) The Board referred to evidence of Liivam to the effect that larger ranchers in the area were trying to increase their holdings and that the trend was to larger holdings in order to make them more economical; and to evidence of Therriault that he had tried to find additional pasture but decided against it because it would not be economical for him to rent. It agreed that if the unexpropriated portion of the quarter section was offered for sale in the open market a small rancher-farmer would be reluctant to buy it but expressed the opinion that there must be a number of other larger rancher-farmers who would pay a premium price for it. The Board stated that Therriault's opinion that the remaining acreage in the quarter section was devalued by \$50 per acre was unsupported by any evidence of sales. Liivam thought it was devalued by \$40 per acre. The Board dismissed his opinion as that of one not qualified to express an opinion on the subject.

I will refer to this finding later in this judgment.

Item (3). I will also refer to this matter later.

(4) I agree that in the circumstances of this case claims number (4) and (5) must be disallowed.

(6) This claim was disallowed in the proceedings for compensation for the lands taken and as stated earlier, I agree with the Board's finding.

(7) I agree that the claim under this heading must be disallowed.

The Board came to the conclusion that the appellants' operation was to some extent adversely affected by the loss of the flooded area; that, as the evidence of loss was indefinite, it must use a judgment figure and it found the appellants entitled to \$2,500 with interest at 7% per annum from January 30, 1969 until paid.

Going back to consider item number (2). No-

where in its decision does the Board appear to have considered the fact that the parcel of land "D" in the quarter section was, by reason of the expropriation, completely isolated from the rest of the appellants' lands remaining in the quarter section. The land appears to have an area of .87 of an acre. The appellants are certainly entitled to be compensated for the loss of this land. It is now impossible to get to this small area from any of their remaining land in the quarter section without either making some arrangements with the respondent or trespassing on the respondent's land.

Then I think the Board must have overlooked the evidence of Therriault to the effect there was not land available in the area to replace the expropriated land and that if there had been the price would be very high and that it would not be economical for the appellants to rent pasture to replace it, with which opinion Liivam agreed.

Again, there was no evidence before the Board nor anything I can find in the proceedings before it to suggest a basis for its finding that there were ranchers in the close vicinity who would pay a premium price for the lands left to the appellants following expropriation.

Re Item (3), I agree with the Board that the problem of access along the west boundary of the subject quarter section was one that had existed prior to expropriation and that the expropriation had not altered the situation in any way. The Board then went on to consider what it thought was the real problem the appellants faced if they were denied access through a gate which appears as gate "G" on the plan hereinbefore referred to. It will be noted that gate "G" is not situate on the subject quarter section and it is apparently an entrance to an access road that leads into the lands apparently also expropriated but not from the appellants' land. Whatever gate "G" gives access to, it does not give access to parcel "D" in the northeast corner of the subject quarter section.

It will also be noted that the Board found that the appellants' operation would be to some extent adversely affected by the loss of the flooded area. But it is not only the flooded area that has been lost to the appellants. It is the whole area of 81.62 acres which the appellants formerly owned and which they now do not own. The Board appears to have lost sight of that fact.

In my opinion the appellants' operation will to some extent be adversely affected but by the loss not only of the flooded area but all of the lands taken.

In estimating what amount the appellants are entitled to as compensation, the Board has, in my opinion, failed to take into account all the matters I have referred to.

I would accordingly increase the award of compensation for injurious affection to \$4,500 with interest at 7% per annum from January 30, 1969, which the parties agreed to as the effective date of completion of the project.

The appellants are entitled to the costs of both appeals.

"E. W. S. Kane"

J.A.

DATED at Edmonton, Alberta, this
25th day of January, A.D. 1971.

S. Denecky, Esq.,
Counsel for the appellants.

G. M. Morrison, Esq.,
Counsel for the respondent.

IN THE SUPREME COURT OF ALBERTA

APPELLATE DIVISION

The Court:

The Honourable The Chief Justice of Alberta
The Honourable Mr. Justice Cairns
The Honourable Mr. Justice Allen

IN THE MATTER OF THE PUBLIC UTILITIES BOARD
ACT, Statutes of Alberta, 1960, Chapter 85,
and Amendments thereto;

AND IN THE MATTER OF THE ALBERTA GAS TRUNK
LINE COMPANY ACT, Statutes of Alberta, 1954,
Chapter 37, and Amendments thereto;

AND IN THE MATTER OF the complaints of THE
CONSUMERS' GAS COMPANY, NORTHERN AND CENTRAL
GAS CORPORATION LIMITED, SASKATCHEWAN POWER
CORPORATION and UNION GAS COMPANY OF CANADA,
LIMITED

BETWEEN:

THE CONSUMERS' GAS COMPANY, NORTHERN AND
CENTRAL GAS CORPORATION LIMITED, SASKATCHEWAN
POWER CORPORATION and UNION GAS COMPANY OF
CANADA, LIMITED

Applicants
(Appellants)

- and -

THE PUBLIC UTILITIES BOARD and THE ALBERTA
GAS TRUNK LINE COMPANY

Respondents
(Respondents)

REASONS FOR JUDGMENT

OF THE HONOURABLE MR. JUSTICE ALLEN

This is an appeal from the refusal of the Public Utilities Board (hereinafter referred to as "the Board") to hear four individual but identical complaints of the appellants filed pursuant to Section 30 of the Alberta Gas Trunk Line Company Act, being Chap. 27 Statutes of Alberta 1954 as amended, hereinafter for convenience referred to as the "Trunk Line Act". The Company incorporated by the said Act under the name of The Alberta Gas Trunk Line Company is hereinafter referred to

as the "Trunk Line Company".

The complaints of the appellants were with respect to the rates, tolls and charges of the Trunk Line Company.

The appellant The Consumers' Gas Company (hereinafter referred to as "Consumers' Gas") is a body corporate, incorporated in 1848 under the laws of the then Province of Canada with its head office in Toronto. It is a regulated public utility owning and operating in its own name or through subsidiaries a natural gas transmission and distribution system in three major geographical regions in Ontario, said to contain more than 17% of the total population of Canada.

The appellant Northern and Central Gas Corporation (hereinafter referred to as "Northern & Central") is a body corporate under the laws of the Province of Ontario with head office at Toronto. It also is a regulated public utility company owning and operating in its own name or through subsidiaries a natural gas transmission and distribution system in the City of Winnipeg, Manitoba and certain contiguous municipalities, in various cities and communities in Ontario and in the Cities of Montreal and Sherbrooke, Quebec, and certain nearby counties. Approximately 17 per cent of the total population of Canada is said to be located within these operating areas.

The appellant Saskatchewan Power Corporation (hereinafter referred to as "Saskatchewan Power") is a body corporate, incorporated by the legislature of the Province of Saskatchewan with head office at Regina. The main objects and business activities of Saskatchewan Power are the production and distribution of electrical energy and natural gas in the Province of Saskatchewan. The corporation is registered under the Companies Act of Alberta as an extraprovincial company.

The appellant Union Gas Company of Canada, Limited (hereinafter referred to as "Union") is a body corporate, incorporated under the laws of the Province of Ontario with head office at

Chatham. It is a regulated public utility company, owning and operating a natural gas transmission and distribution system across southwestern Ontario in areas having a total estimated population of 2,194,000. It is registered in Alberta as an extraprovincial corporation.

The Trunk Line Company is a corporation incorporated in 1954 by an Act of the legislature of Alberta under the title of "The Alberta Gas Trunk Line Company Act". It shares are held by the Government of Alberta, a number of utility and gas producing companies and members of the public on a basis of distribution not material to the case under consideration. It owns and operates an extensive natural gas gathering and distribution system and facilities. It does not purchase natural gas from producers but transports and delivers the gas produced by them to some utility companies in Alberta and to four major gas transmission lines the owners and operators of which purchase from the producers gas for export from Alberta, the deliveries of gas to their lines being made by the Trunk Line Company at points on or near the boundaries of the Province of Alberta. For its services the Trunk Line Company exacts certain rates or charges designed to meet its expenses and cost of operations and provide a rate of return upon its investment in lines and other facilities.

Section 30 (1) of The Trunk Line Act provides as follows:-

"30.(1) The Company shall from time to time fix the rates, tolls and other charges for the gathering, treating, transporting, storing, distributing, handling and delivery of gas carried by its pipe lines and other facilities or any part or parts thereof, or for any service performed by the company in relation to the gathering, treating, transporting, storing, distributing, handling or delivery of any gas."

The same section contains provision entitling interested parties to complain to the Public Utilities Board against the rates, tolls and charges so fixed by the Company, to which reference will be made in some detail later on.

One of the transmission lines to which natural gas is delivered by the Trunk Line Company for export from Alberta is Trans-Canada Pipe Lines, Limited (hereinafter referred to as "Trans-Canada") a company incorporated under an Act of the Parliament of Canada to own and operate an interprovincial gas transmission line.

Each of the appellants purchases substantial quantities of natural gas under various contracts with Trans-Canada for resale and distribution to residential, industrial and commercial customers in the areas respectively served by them, and the gas so purchased by them from Trans-Canada is obtained by Trans-Canada, almost wholly, if not entirely, from sources within Alberta.

As noted above, the natural gas which Trans-Canada purchases in Alberta is transported for it to delivery point at or near the border of the Province by the Trunk Line Company and Trans-Canada pays the rates, tolls or charges imposed by the Trunk Line Company for the services it so renders.

The National Energy Board appointed under the National Energy Board Act of Canada fairly recently ordered a hearing for the determination of the rate base, rate of return and total cost of service of Trans-Canada for natural gas sold by it in Canada. The appellants anticipate, quite reasonably, it would appear, that the cost of service which may ultimately be determined in the proceedings before the National Energy Board will include the transportation charges paid by Trans-Canada to the Trunk Line Company for the services performed by the latter, and that by reason of the provisions of the contracts of the appellants with Trans-Canada or the cost of service to be determined by the National Energy Board or both the appellants will be required to reimburse Trans-Canada, directly or indirectly, in whole or in part for the rates, tolls and charges of the Trunk Line Company.

By resolution of the directors of the Trunk Line Company passed on June 26th, 1970 (under the authority of Sect. 30 (1) of its Act of Incorporation quoted above) it was resolved that a return at an annual rate of 8-3/4% on its net investment rate base be fixed by the company effective July 1st, 1970. This is a higher rate of return than that previously provided for and presumably will necessarily result in an adjustment or increase of its rates, tolls and charges to provide for this increase.

Section 30 (2), (3) and (4) of the Trunk Line Act, to which brief reference was made above, provides as follows:-

"(2) Upon complaint in writing of an interested party the Public Utilities Board may, or upon the direction of the Lieutenant Governor in Council shall, after notice to and hearing of the parties interested, determine the justness and reasonableness of any rate, toll or charge fixed by the company and by order in writing may vary or confirm the rate, toll or charge.

(3) Where the Public Utilities Board varies a rate, toll or charge fixed by the company, its order shall specify that the variation shall remain in force and effect until a specified date or until the date of the happening of a specified event but in no case shall the period involved exceed 12 months.

(4) The provisions of Part I of The Public Utilities Board Act apply with respect to matters within the jurisdiction of the Public Utilities Board under this section in so far as they do not conflict with the provisions of this section."

After the passing of the resolution provided for an increase in the rate of return of the Trunk Line Company on its investment rate base as above noted, complaints were filed under Section 30 (2) quoted above by the major gas transportation lines, including Trans-Canada, for whom gas is transported in Alberta by the Trunk Line Company on the grounds that the said rate of return is unjust and unreasonable. The Public Utilities Board has scheduled a hearing into those complaints and has accorded to each of the appellants, all of which have filed "interventions" therein, the status of "parties interested" in "association" with Trans-Canada.

The appellants apparently have decided that the complaints filed by the Pipe Line Companies do not go far enough to suit them and on or about October 21, 1970 they tendered for filing with the Public Utilities Board complaints by each of them that the application of the annual rate of return so fixed by the Board of the Trunk Line Company resulted in rates, tolls and charges which are unjust and unreasonable.

By letters addressed to the solicitors for the applicants dated October 22, 1970 and couched in identical terms except for reference to the individual complainants the Public Utilities Board rejected the complaints. The relevant portions of the letters of rejection read, in each case, as follows:-

"The Board has ruled in the preliminary hearing held in respect of the complaints of Alberta and Southern Gas Co. Ltd.; Westcoast Transmission Company Limited; Westcoast Transmission Company (Alberta) Ltd. and Trans-Canada Pipe Lines Limited, that under the provisions of Section 30 of The Alberta Gas Trunk Line Company Act the Board can on these applications only determine the justness and reasonableness of the annual rate of return of 8 3/4% on the net investment rate base fixed by the Board of Directors of The Alberta Gas Trunk Line Company in the Resolution of the Board of Directors passed on the 26th day of June, 1970. Under this provision the Board takes the view that it merely acts as an arbitrator to deal with the complaint concerning such return.

In the hearing of the above complaints, which will commence on November 17, 1970, (the appellants to whose solicitors the letter is addressed), as the Board has ruled, will be entitled to participate as a 'party interested' in association with the complainant, Trans-Canada Pipe Lines Limited, with whom it has a contractual relationship. Trans-Canada, and other complainants, of course, have a direct contractual relationship with The Alberta Gas Trunk Line Company. The arrangement which the Board has made in associating parties interested who do not have contracts with The Alberta Gas Trunk Line Company with complainants who have contract with such party and with The Alberta Gas Trunk Line Company, is for the purpose of an orderly hearing and not to prevent a party interested from being represented by its own counsel.

As outlined during the course of the preliminary matters dealt with on September 10 and October 8, 1970, as contained in the transcript of the proceedings, (the ..

" complaining appellant) is entitled, as a party interested, to be an intervener associated with the complainant Trans-Canada Pipe Lines Limited with which company it has a contract.

The effect of this ruling is, that while the Board has ruled that a party who has no contract with The Alberta Gas Trunk Line Company and whose operations are outside the Province may participate in the hearing to the extent of being associated with one of the complainants, the Board has decided that it does not have jurisdiction to hear the particular complaint of such a party."

There followed a paragraph returning the complaint to the solicitors for the appellant to whom the letter was addressed.

It is, in my view, implicit in the wording of the letters of rejection quoted above that the Public Utilities Board must have rejected the complaints on the ground that the appellants who tendered them were not "interested parties" entitled to file complaints under Section 30 of The Trunk Line Act and that was the reason for the decision or ruling that it did not have jurisdiction to hear those complaints. If this be so, the Board has, in my opinion, erred in law in determining that it had no jurisdiction to hear the complaints.

Upon the application of the appellants leave was granted under Section 62 of the Public Utilities Board Act (Chap. 85 Statutes of Alberta 1960) to appeal from the decision of the Board to this division.

It appears to me that there is a relatively simple point for this Court to decide on this appeal, namely, whether or not each of the appellants is an "interested party" within the meaning of that term as used in Section 30 (2) of the Trunk Line Act. If they are, then there is no doubt that the Public Utilities Board has jurisdiction to hear their complaints and consequently the complaints should not have been rejected.

I might perhaps at this point add that the Board's gesture in permitting the appellants "to participate in the hearing to the extent of being associated with one of the complainants

(the pipe line companies)" appears to be of no value to the appellants as it was stated that the pipe line companies were either not interested in pursuing the line of complaint adopted by the appellants, or were not interested in pursuing it to the extent that the appellants desire to do.

Are the appellants then interested parties entitled to complain under the provisions of Section 30 (2) of The Trunk Line Act?

A number of authorities have been cited by counsel which are helpful in determining this question, but first we should perhaps consider the meaning the dictionaries ascribe to this word because as it is said in "Craines on Statute Law" 6th edition at p. 161:-

"No doubt reference to the better dictionaries does afford, either by definition or illustration, some guide to the use of a term in a statute. Lord Coleridge said, in R. vs. Peters (1886) 16 Q.B.D. 636, 641, 'I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books.'"

In the Shorter Oxford English Dictionary (3rd edition) the word is defined as:-

"1. concerned, affected; having an interest or share in something 1828; 2. self seeking, self interested; 3. characterized by a feeling of concern, sympathy or curiosity 1665."

In Webster's New World Dictionary of the American Language the word "interested" is defined as follows:-

"Interested, adj. (p.p. of interest) 1. having an interest or share; concerned; 2. influenced by personal interest; 3. biased or prejudiced; 4. feeling or showing interest or curiosity."

There appears to be no reason why the word "interested" in Section 30 (2) of the Trunk Line Act should be interpreted other than in its ordinary sense. However it is contended by the respondents that the word has no well defined meaning and that therefore it should be construed only by examining

the purpose and scope of the Act in which it is used (Bearnans Ltd. v. Metropolitan Police District Receiver (1961) 1 W.L.R. 634 per Devlin L. J. at p. 635; Maxwell on Interpretation of Statutes 12th Ed. p. 76).

It is contended by the appellants that the purpose of Section 30 (2) of the Trunk Line Act is to provide an avenue or procedure through which those affected by a resolution of the Board of the Trunk Line Company prescribing rates, tolls and charges may make representations to the Public Utilities Board and there can be little doubt that the complainants, as purchasers of gas in which, as an element affecting the price, the rates, tolls and charges of the Trunk Line Company must be taken into account would normally be affected by any changes therein.

There are a number of judicial decisions and pronouncements bearing upon the interpretation of the word "interested" when used in Statutes, which may be considered in determining the question as to whether the appellants are interested parties within the meaning of Section 30 (2) of the Trunk Line Act.

The first and perhaps earliest of these which I shall refer to is Pelsall Coal and Iron Company v. London & North-Western Railway Co. XXIII Q.B.D. 536, which was an application to the Railway and Canal Commission under Section 14 of the Regulation of Railways Act 1873 which was adjourned into Court for hearing and dealt with by Wills J., Sir Frederick Peel (Commissioner) and Mr. Commissioner Price. The sections of the Act in question in that case provided that every railway company should keep at each of their stations a book showing rates for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station to any place to which they booked, and also provided that the commissioners might from time to time "on the application of any person interested" make orders with respect to any

particular description of traffic requiring the company to distinguish how much of such rate was for conveyance of the traffic on the railway and how much for other expenses and by the Railway and Canal Traffic Act, 1888 which was to be construed as one with the Regulation of Railways Act 1873 a railway company was obliged within one week after application in writing by any person interested in the carrying of merchandise to render an account breaking down, dividing and furnishing details of the rates charged.

The applicant applied for such an order as regards the rates charged by the railway company for conveyance of coal and slack from Pelsall and other stations on the railway line to various places and the railway company opposed the application on the ground, inter alia, that except as to Pelsall Station the applicant was not a "person interested" within the meaning of the statute as no traffic was booked for them at any of the other stations.

In this case Wills, J., with whom Commissioner Price concurred, said at p. 545:-

" A further question has been raised as to whether the applicants are parties 'interested' within the meaning of the section. The London and North-Western Company contend that no one is 'interested' within the meaning of the section, except the person who has to pay the rate in respect of which the order is sought. There was a good deal of verbal criticism, on both sides, as to the meaning of this word, and reference was made to other sections and to other Acts in which the expression has been used. To my mind it seems much more satisfactory to say that the expression used in s. 14 occurs in one of a series of Acts of which one of the main purposes (if not the most important purpose of the first of them, the Act of 1854) was to put a stop to undue preferences, and that the usefulness of this section would be destroyed and its aim paralyzed by putting upon it any such narrow construction. In my opinion any person who makes out by proper evidence that the rates which he seeks to have dissected are really and substantially competitive rates with his own is a 'person interested' within the meaning of the section."

Sir Frederick Peel said at pp. 552 and 553:-

" There is, therefore, much to be said for the expediency of not construing the word 'interested' so strictly. It was admitted, I think, by Mr. Wright, that used by itself,"

" as here, it is not a word of any technical or special legal sense, and I can see nothing to require or suggest the narrow construction that that species of interest only is intended which arises from actual dealings with a company at the particular rates. In the common case of persons about to enter upon some business on premises adjoining a station, and seeking to know all about the rates on their particular description of traffic, and who have made and been refused a demand for such information, are they to be denied a locus standi under this section, because they have as yet had no transactions with the railway company? They are interested beyond all doubt, and all that the enactment requires is that an applicant should be interested. It does not say interested in any particular way, nor at all how interested; and as the enactment is not one to be narrowly expounded, I am of opinion that interested means here, what it would mean in popular language, however interested, and that it takes in all persons who have a bona fide interest in knowing how the particular rates that are the subject of their application are made up. Here the applicants claim to be interested on the ground that they have made a complaint under s.2 of the Traffic Act, 1854, that the coal and slack they send from their works on the South Staffordshire Railway competes with the similar traffic sent from other works on the same railway to the same places to which they send, and that, having regard to what is done by the railway company in respect of carriage and other services for them and their competitors respectively, their rates are higher in proportion than the rates their competitors are charged, and are an undue prejudice, and that the information they ask for by this summons is necessary to their contention on that complaint. This I think makes them interested in a sense to satisfy the statute."

While the weight of authority to be given to this decision may be questioned, as it is not a decision of the Court of Appeal or higher authority, the reasoning of Wills J. and Sir Frederick Peel appears to me to be sound and very relevant to the circumstances of the case we have under consideration here.

In *The City of Toronto vs. The Grand Trunk Railway Company of Canada* (1905-1906) 37 S.C.R. 232 it was held that a municipality in which a highway crossed by the Railway was situated as "a person interested" which could be required by the Railway Committee to bear a portion of the cost of gates or other protective devices and Davies J. said at p. 242:-

"The only question then remaining would be whether the municipality was a 'person interested' within the meaning of these words in the section. "

" In the first place by R.S.C. ch. 1, sec. 7, sub-sec. 22, the word 'person' includes any body corporate and politic so that if Parliament had power to do so it has declared municipalities interested as being within the classes liable to contribute to the expenses of the protective measures ordered.

By the 'Consolidated Municipal Act of Ontario, 1892,' ch. 44, sec. 3, the inhabitants of every city, etc., are declared to continue as a body corporate.

While there may be some doubt as to the complete title of the municipality to the soil or freehold of and in the public roads and streets within its bounds, there is none that such roads and streets are vested in it and under its jurisdiction and that it is the virtual owner of the public roads and streets within its bounds and liable to keep them in repair.

The practical interest, therefore, of the municipality in the road, and in the manner in which the Railway Committee deals with it whether by deflecting it or carrying it under or over the railway or merely causing gates to be placed across it with watchmen, seems to be indisputable. The municipality in this respect represents its entire population."

In *Toronto Railway Company vs. City of Toronto* (1916)

53 S.C.R. 222 Anglin J. appears to have attached the common meaning to the words "persons interested or affected" among whom the Board of Railway Commissioners was empowered to apportion the costs of a subway to eliminate a level crossing. See also *Toronto Railway Company vs. Toronto City* (1920) A.C. 426 and *Bell Telephone Co. of Canada vs. C.N.R.* (1932) S.C.R. 222.

In *Canadian Pacific Railway Company vs. Toronto Transportation Commission* (1930) A.C. 686 the Privy Council dealt with the validity of certain orders made by the Board of Railway Commissioners of Canada under section 39 (1) of the Railway Act requiring the Toronto Transportation to contribute to the cost of subways as a person or party "interested or affected by the order requiring their construction. On p. 697 Lord MacMillan delivering the judgment of the Privy Council said:-

"Sect. 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious.

" The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision."

In Hall Development Company vs. B. & W. Inc. (1952) Ex. C.R. p. 347 Thorson P. in dealing with section 60(1) of the Patent Act 1935 reading as follows:-

"60(1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court of Canada at the instance of the Attorney General of Canada or at the instance of any interested person."

after referring to a contention by the defendant that it might result from proceedings currently carried on in the United States that the plaintiff had no rights in the inventions referred to in the statement of claim and would therefore not be an interested party within the meaning of the section said:-

"I am satisfied that there is no substance in this submission and that the plaintiff is sufficiently 'interested' to enable it to sue. It is not necessary that it should be entitled to the invention or application claimed by it. It is enough to show, as it has sufficiently done ... that it was engaged in dealing with the same kind of thing as the defendant and was in competition with it. It would not matter, therefore, whether the United States District Court action might result in some one other than the plaintiff being found entitled to the invention and application claimed by it: vide Bergeon v. The De Kermor Electric Heating Co. Ltd. (1926) S.C.R. 72; Refrigerating Equipment Ltd. v. Waltham System Incorp. (1930) Ex. C.R. 154 at 157."

While none of these cases may bear directly upon the point in issue here they are in my opinion illustrative of the broad sense in which the words interested parties or interested persons have been interpreted by the Courts and the corresponding reluctance of the Courts to give them the restrictive meanings which have been contended for therein.

It is difficult to see how, given the broad interpretation which seems to have found favor with the Courts, the words "interested party" as used in Sec. 30 of the Trunk Line Act cannot be said to embrace each of the appellants in this case in view of the direct concern each of them has in the rates,

tolls and charges of the Trunk Line Company which are an element in the price they pay to Trans-Canada for gas and the effect this may have on their competitive position with distributors of other types of energy (e.g. oil, coal and electricity) in the areas served by them.

As against this the Board and the Trunk Line Company argue that the interest of a party to whom section 30 applies must be a proprietary or contractual interest arising from a direct contractual relationship with the Trunk Line Company. I think the authorities I have cited and the application of the common sense rule referred to by Lord MacMillan justify the rejection of this argument.

They also argue that the determination of who are interested parties is a matter within the discretion of the Board and the Court should not substitute its opinion for that of the Board on that aspect. I can see nothing in section 30 which, even inferentially, has the effect of giving the Board this discretion. It may have discretion in deciding whether or not a hearing should be called to determine the justness and reasonableness of the rate, toll or charge fixed by the Company in respect of which the complaint is made, but this does not preclude this court from determining whether or not a party is "interested" within the meaning of the section, and in this connection I must point out that the wording used by the Board in its letters of rejection of the complaints seems to indicate that it considered the appellants "interested parties" in the broad sense of those words.

I do not think that the case of re Galloway Lumber Company and B.C. Labour Relations Board 48 D.L.R. 2nd p. 587 cited by the respondent Board is at all helpful to it in this connection. There the question was whether a decision of the B.C. Labour Relations Board directing an arbitration in a case of wrongful dismissal was open to review and the

Supreme Court of Canada held it was not because power to appoint an arbitrator in these circumstances was by statute vested in the Board "if in its opinion the question is arbitrable", and it was held that the Board had accordingly made a decision which it alone had the power to make.

(Emphasis added by me) Nothing can be found in section 30 (1) of the Trunk Line Act to support a similar contention that the Board has such discretion in determining who are interested parties within the meaning of that section. In Memorial Gardens Association Ltd. v. Colwood Cemetery Company et al (1958) S.C.R. 353, also cited by the respondent Board, where the question was whether the British Columbia Public Utilities Commission had discretion to determine whether public convenience and necessity required a certain action, Abbott J delivering the majority opinion of the Court pointed out that the question was not one of fact but predominantly the formation of an opinion and the decision was one which could not be made without a substantial exercise of administrative discretion which had been delegated to the commission. Surely no such argument can be advanced to support the discretion of the Board in this case. The respondent Board also referred to County of Carleton vs. City of Ottawa XLI S.C.R. 552, but in that case it is pointed out by Davies J. at p. 556 that "the decision of the Board as to whether a municipality was or was not a 'party interested' was made by the (governing) statute binding and conclusive." As no such condition seems to exist in this case, it would not appear that the Carleton case lends much support to the respondents' contention.

A point was raised as to the possible difference between the words "interested person" and "interested party", the latter, it being contended, indicated a more restricted classification than the former but it is noted, and was

admitted on the hearing that the words "person" and "party" seemed to be used interchangeably in some of the authorities cited and not too much argument was directed to that contention, with which I am not impressed.

A restricted application of the word "party" might be justified when used in certain contexts or with respect to certain subject matters, e.g. in reference to Court actions or to contracts, but there is no such limiting factor present here.

I am therefore of the opinion that the appeal from the Board's decision should be allowed, and the Board should be directed to receive and deal with the appellants' complaints.

(SIGNED) G. H. ALLEN
J.A.

DATED at Calgary, Alberta,
the 1st day of February, 1971.

D. P. McLaws, Esq., Q.C., and
R. J. Gibbs, Esq., Q.C.,
Counsel for the Appellants

D. B. Mason, Esq.,
Counsel for the Respondent Board

G. R. Forsyth, Esq.,
Counsel for the Respondent, Alberta Gas Trunk Line Company

828
IN THE SUPREME COURT OF ALBERTA

APPELLATE DIVISION

IN THE MATTER OF THE PUBLIC UTILITIES
BOARD ACT, Statutes of Alberta, 1960,
Chapter 85, and Amendments theret

AND IN THE MATTER OF THE ALBERTA
GAS TRUNK LINE COMPANY, Statutes of
Alberta, 1954, Chapter 37, and
Amendments thereto;

AND IN THE MATTER OF the complaints
of THE CONSUMERS' GAS COMPANY,
NORTHERN AND CENTRAL GAS CORPORATION
LIMITED, SASKATCHEWAN POWER
CORPORATION and UNION GAS COMPANY
OF CANADA, LIMITED

BETWEEN:

THE CONSUMERS' GAS COMPANY,
NORTHERN AND CENTRAL GAS
CORPORATION LIMITED,
SASKATCHEWAN POWER CORPORATION
and UNION GAS COMPANY OF
CANADA, LIMITED

Applicants
(Appellants)

- and -

THE PUBLIC UTILITIES BOARD
and THE ALBERTA GAS TRUNK
LINE COMPANY

Respondents
(Respondents)

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE ALLEN

I concur

) S. Bruce Smith;
C.J.A.

I concur

J. M. Cairns
J.A.

IN THE SUPREME COURT OF ALBERTA
TRIAL DIVISION
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER of Section 56 of The Public Utilities Board Act, being Chapter 302 of the Revised Statutes of Alberta, 1970 and Section 32 of The Expropriation Procedure Act, being Chapter 130 of the Revised Statutes of Alberta;

IN THE MATTER of three Applications to the Public Utilities Board by Calgary Power Ltd., for an Order amending the terms of Orders previously granted by The Public Utilities Board;

AND IN THE MATTER of Decision No. 30225 of The Public Utilities Board.

B E T W E E N:

CALGARY POWER LTD.

Applicant

- and -

THE PUBLIC UTILITIES BOARD

Respondent

- and -

EDWIN REAVLEY BOYD, and FARM CREDIT CORPORATION

Respondents

- and -

ELSA MARGUERITE COOPER, JAMES W. GRAHAM and
HOME OIL COMPANY LIMITED

Respondents

- and -

LLOYD DEAN NELSON, BRUCE ANDREW NELSON and
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Respondents

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE H. W. RILEY

THE ISSUE

The issue raised in this application for an Order in the nature of mandamus is whether the Public Utilities Board still has jurisdiction to vary or amend Orders previously made

by it.

THE APPLICANT'S SUBMISSION

It is the Applicant's submission that the Public Utilities Board does have such jurisdiction in that:

1. The relevant legislation expressly reserves the Public Utilities Board authority to review, rescind or vary any Order or decision made by it and does not grant co-extensive jurisdiction to any other tribunal; or, alternatively,
2. The Public Utilities Board retains jurisdiction to hear and determine expropriation proceedings that were commenced before July 1st, 1970, which commencement is on application to the Minister for the right to expropriate.

FACTS

1. In 1961 the Applicant commenced proceedings by making application to the Minister of Agriculture for a Certificate of Approval under the provisions of The Water Resources Act, being Ch. 362 of the R.S.A., 1955, as amended, and particularly Section 84 through 84(i) of said Act as then amended.
2. On September 18th, 1961 the Minister of Agriculture granted a Certificate of Approval, pursuant to Section 84(b) and and 84(c) of The Water Resources Act, which approved the intended route of a 150 foot right-of-way for electrical transmission lines of the Applicant over the lands of the individual Respondents, and also approved the acquisition by the Applicant of those lands within the 150 foot right-of-way.
3. At all material times all parties, including the Minister of Agriculture, were aware that there were two transmission lines planned for the 150 foot right-of-way authorized.
4. As the Applicant and the individual Respondents were unable to reach agreement for the taking of the lands, the Applicant, pursuant to Section 84(d) of The Water Resources Act, continued the proceedings for expropriation by making application under The Expropriation Procedures Act, being Chapter 30 of the 1961 Statutes of Alberta, to the Public Utilities Board.

5. In March 1963 the Public Utilities Board issued Orders number 26116 with respect to the Respondent, Edwin R. Boyd, Order No. 26114 with respect to the Respondents, Elsa Marguerite Cooper and James W. Graham and Order No. 26115 with respect to the Respondents Lloyd D. Nelson and Bruce Andrew Nelson. Each of these Orders granted to the Applicant an Easement of the 150 foot right-of-way for the construction of its electrical transmission lines, as prescribed by the Minister's Certificate of Approval. The Board's Orders, having granted the Easement restricted the immediate use to the construction, erection and maintenance of towers, wires, etc. sufficient for the first transmission line. At those hearings, and on the subsequent appeal, the Applicant acknowledged that while it proposed to construct additional transmission facilities on the interest which it had acquired it would nevertheless have to come back to the Public Utilities Board on construction of the second line to vary the terms of the Board's Orders and to fix the further compensation for any damages.

(Counsel for the Respondents Boyd, Graham, Nelson and Nelson points out that the Orders issued by the Board make no reference to construction of a second transmission line and states the awards made by the Board considered only the transmission line that was constructed and energized in September of 1962 and that the decision of the Court of Appeal with respect to the acts made is unreported and the Court merely upheld the Board's award.)

6. On January 4th, 1971 the Applicant filed with the Public Utilities Board application for amendment to each of the aforesaid Orders to allow the construction of two additional steel towers under each Order so to effect the erection and maintenance of the second electrical transmission line.

7. On March 25th, 1971 the Public Utilities Board heard applications for Interim Orders permitting the Applicant immediate entry to begin such construction upon deposit being fixed and received by the Public Utilities Board. At the conclusion of the meeting, at which the individual Respondents appeared or were represented, the Public Utilities Board, having

found a need for immediate entry, stated that the interim amendments applied for would be granted upon payment by the Applicant to the Public Utilities Board of a deposit of \$250.00 for each of the three Applications. Those sums were paid to the Public Utilities Board on April 7th, 1971.

8. On May 10th, 1971 the Public Utilities Board issued its decision No. 30225 in which it held that the Board did not have the jurisdiction to amend its prior Orders.

9. By Originating Notice of Motion dated May 25th, 1971, the Applicant applied for an Order in the nature of a mandamus to compel the Public Utilities Board to exercise its jurisdiction.

10. Those parties represented in the application have agreed there are no technical objections raised and all procedural requirements have been properly complied with, though counsel for the Public Utilities Board has expressly reserved argument as to whether mandamus should lie in the present instance.

(It is pointed out that only the Respondents, Lloyd Dean Nelson, Edwin Reavley Boyd were present without Counsel at the Board's hearing on March 25, 1971).

I was referred to many Acts:

- 1) The Expropriation Procedures Act, being Ch. 130 of R.S.A. 1970.
- 2) The Public Utilities Board Act, being Ch. 302 of R.S.A., 1970.
- 3) The Hydro and Electric Energy Act (being Bill 76 which received Royal Assent on April 27th, 1971 and came into force on June 1, 1971.
- 4) The Water Resources Act, being Ch. 38, R.S.A. 1970.

and the Applicants suggest, insofar as they relate to jurisdiction really is as follows:

- a) if the Licensee has applied to the appropriate Minister for approval prior to July 1st, 1970, any subsequent applications for expropriations are to be heard by the Public Utilities Board;
- b) if the Licensee has applied to the appropriate Minister for approval on or after July 1st, 1970 and prior to June 1st, 1971, any subsequent applications for expropriation are to be heard by the Board of Arbitration;
- c) if the Licensee desires to expropriate land after June 1st, 1971 he must obtain the approval of the Energy Resources Conservation Board and any subsequent applications for expropriation are to be heard by the Board of Arbitration.

In the result the Applicant submits that the present applications were to amend prior Orders of the Public Utilities Board, which Board has exclusive jurisdiction. It is the Applicant's further submission that the Public Utilities Board retains jurisdiction to hear these applications whether or not they are in the nature of an application to expropriate land, and indeed any further applications relative to these lands or these lines contemplated by the Minister's Certificate of Approval are to be heard by the Public Utilities Board.

Therefore the Applicant urges that the Public Utilities Board should be directed to proceed to a decision on the hearings already conducted in alleged exercise of its jurisdiction.

I am unable to agree with the Applicant's submission.

Out of the myriad of legislation the following seems to be important.

- 1) The Public Utilities Act, cited supra.

"56. The Board may rehear an application before deciding it, and may review, rescind or vary any order or decision made by it.

62. (1) Subject to subsection (2), upon a question

"of jurisdiction or upon a question of law, an appeal lies from the Board to the Appellate Division of the Supreme Court of Alberta.

(2) Leave to appeal shall be obtained from a judge of the court of appeal upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from, or within such further time as the judge under special circumstances may allow, and upon notice to the parties and to the Board, and upon hearing such of them as appear and desire to be heard, and the costs of the application are in the discretion of the judge.

67. Except as otherwise provided in this Act,

(a) every decision or order of the Board is final, and

(b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court."

2) The Expropriation Procedures Act, cited supra.

"32. (1) Except as provided in subsection (2), the Public Utilities Board has jurisdiction with respect to expropriations under this Part.

(2) The Board of Arbitration has jurisdiction with respect to expropriations under this Part authorized under or pursuant to

(a) The Pipe Line Act, or

(b) The Water, Gas, Electric and Telephone Companies Act, or

(c) section 86 of The Water Resources Act, where such expropriation proceedings are commenced on or after July 1, 1970.

(3) Where an authorizing Act empowers a company to acquire land by expropriation, the land may be expropriated in the manner prescribed by this Part and not otherwise but subject to any provisions of the authorizing Act respecting the holding of a permit by the company.

48. (1) The provisions of Part 1 of The Public Utilities Board Act, relating to the powers of the Public Utilities Board, the procedure of that Board and the enforcement of orders of that Board, apply to proceedings and orders of that Board under this Act insofar as they do not conflict with the provisions of this Act.

" (2) The provisions of The Right of Entry Arbitration Act relating to the powers of the Board of Arbitration, the procedure of that Board and the enforcement of orders of that Board apply mutatis mutandis to proceedings and orders of that Board under this Act insofar as they do not conflict with the provisions of this Act."

I am of the opinion that I am precluded from hearing this application for an Order in the nature of mandamus. I am further of the opinion that the Public Utilities Board was correct in deciding it did not have the jurisdiction to grant the Orders applied for by Calgary Power Ltd. because Section 32 of The Expropriation Procedures Act requires such Orders to be made by The Right of Entry Arbitration Board, and the application of Calgary Power Ltd. to the Public Utilities Board concerned an expropriation proceeding commenced after July 1, 1970.

In passing, it is noted that the present application of the Applicant, Calgary Power Ltd., amounts to "a desire to expropriate land" or an application to "acquire land by expropriation" and that of itself is an admission that the governing Acts should be The Expropriation Procedures Act. By way of obiter may I say that compensation for an Easement may well differ from a sale of land in that it is one thing to obtain an Order from the Board of Public Utilities Commissioners for the construction of electrical transmission lines but only with respect to the erection and maintenance of certain towers and wires, etc. It is a very different thing to erect additional towers on the right-of-way by which the Applicant, Calgary Power Ltd., would now be acquiring a further interest in the owners' lands.

With respect to mandamus, one of the prerogative writs, it is clear that such should not be granted where there is an adequate alternative remedy such as by way of appeal.

See Sanders vs. The Queen (1970) S.C.R. 109 and particularly the Judgment of Martland, J., speaking for the majority on pages 140-141-143 and 147 (a certiorari case).

And See Chad Investments Ltd. vs. Longson, Tammets, & Denton Real Estate Ltd., and the City of Edmonton, and the Council of The City of Edmonton and the Development Appeal Board for the City of Edmonton, a Judgment by the Appeal Division of this Province, unreported and dated July 2, 1971.

The Application is therefore dismissed with costs on Column 5.

"H. W. Riley"

J. S. C.

D. O. Sabey, Esq.
of Counsel for the Applicant
Calgary Power Ltd.

Miss M. Cormack
of Counsel for the Respondent,
Public Utilities Board

B. W. Harrison, Esq.
of Counsel for the Respondents,
Edwin Reavley Boyd, James W. Graham,
Lloyd Dean Nelson and Bruce Andrew Nelson

DATED at the City of Calgary, in the Province of
Alberta, this 16th day of July, A.D. 1971.

IN THE DISTRICT COURT OF THE
DISTRICT OF SOUTHERN ALBERTA
JUDICIAL DISTRICT OF CALGARY

632

BETWEEN:

ADDERSON HOLDINGS LTD.,

Applicant,

- and -

THE CITY OF CALGARY,

Respondent.

This case, the applicant seeks an order to quash Bylaw 8196 of the City of Calgary on the grounds that the City failed to comply with Section 130 of the Municipal Act; also that the expropriation is not for a municipal purpose, as defined by the Municipal Government Act; and that the respondent acted in bad faith in the passing of the bylaw. Other heads of the motion were not argued too strongly.

The ground that the land expropriated was not for municipal purposes, also was not strongly argued, in fact I would say that on the face of it it is clear that this bylaw was an expropriation for a purpose under the Municipal Act. A golf course or park is clearly a municipal purpose.

Illegality or bad faith has caused me some difficulty. It is difficult to prove that the council of a city as a whole is acting in bad faith or for an improper purpose. I think the authorities establish that clearly. There is however some evidence here which I think should be brought to your attention. The evidence of Alderman Dooley and Commissioner Hamilton and especially the report of Mr. Howarth, City Engineer, which I tried to get somebody to identify; exhibited to the affidavit of Mr. Willis, has a rather important paragraph.

"It must be emphasized that much of the problem associated with this area is the result of the sub-division of the property by Mr. Adderson. It should also be pointed out that Mr. Adderson has been attempting to

"have the City, since 1969, undertake major works on other portions of his golf course to control potential slide conditions, and in particular, an area immediately to the north below the intersection of 43rd and 44th Avenue Northwest. Because of the general condition of the area and the potential additional demand, we believe the control of this area by the City is necessary to assure that the taxpayer's moneys are not spent to upgrade private property for future speculative purposes."

This is coming very close, in my view, to indicate to me that this whole bylaw is colourable. Is it wrong for a man to own land? Is it wrong for a man to claim that his property is damaged by the City and claim for damage caused by the City? The council could have acted on that basis, could have acted on that kind of information, but it requires strong evidence, as I said before, to attack the whole conception that council is acting for improper reasons.

We now come to Section 130 of the Municipal Government Act, because this is the crux of the whole matter. I am going to read it again because I hold that Section 130 is a condition precedent to the municipality exercising any powers under the Expropriation Procedure Act.

It reads; "If the council desires to acquire land for any purpose authorized by this act which are required for municipal public use, the municipality shall first negotiate with the owners and occupiers of such land, or other persons interested therein for the acquisition of the land by agreement and in case it cannot acquire the land at an acceptable price by agreement the municipality may acquire the land by expropriation pursuant to the Expropriation Procedure Act."

Now, in reading this section I would say that when it says, "In case it cannot acquire the land at an acceptable price by agreement," that means a price acceptable to the City. There is no reason to speculate that it is acceptable or an acceptable price to the owner. There has to be an acceptable price to the City. In addition to that there must be negotiations.

I would like to go over the evidence as I took it down with respect to just what was said with respect to negotiations. First of all Mr. Adderson says; I am just taking this excerpt

I hope you understand, gentlemen. He said; "I just didn't want to sell." Now he is referring to the general proposition, that is to sell or not. He says again; "We didn't want to sell the land." Again; "We didn't have any intention at all to sell the land." He goes on, the next statement was, "The company was not prepared to discuss the sale of land." Now, that is his position, that is pretty strong but he goes further and he says that, "No sum of money was ever mentioned before the Notice of Expropriation." This was confirmed by Mr. Mayland; that the first time money was mentioned by the City was when the Notice of Expropriation was served on Adderson Holdings Ltd.

Mr. Hamilton on the same point said, "No price acceptable to the City was established, that no price was ever established by the council and that any such price would have to be approved, approved by the council." It is therefore clear that the price would have to be approved by council. It never was approved by the council or established by the council and Mr. Mayland, stated "That the first time any amount was conveyed to Adderson was on the Notice of Expropriation." In reply to a question he said, "If Adderson had accepted this offer we would have recommended it to the City," so that is the evidence upon which I must decide whether or not Section 130 has been complied with.

If you look at the Expropriation Procedure Act it says, Section 22 (1) "Where a municipality is empowered to acquire land by expropriation, the land may be expropriated in the manner prescribed by this part and not otherwise."

What does the City have to do under Section 24, sub-section 1, it reads:

"Where a municipality desires to expropriate land for any purpose permitted by the authorizing act, the municipality shall cause to be prepared and filed in the offices of the secretary-treasurer or clerk of the municipality a plan of the land it proposes to expropriate."

They have started the expropriation.

Section 24 (2) provides that after filing a plan "The municipality shall cause to be served upon the owner of the land to be expropriated a notice in writing which shall set forth.

(c) The amount that the municipality is ready to pay for the land to be expropriated." This notice of expropriation was served upon the applicant. There is no doubt that the expropriation had started. In other words, this was not being done in compliance with Section 130 of the Municipal Government Act, it was being done under the provisions of the Expropriation Procedure Act. I think that is very clear. If there was no acceptable price established by the City, how can the City say that it could not acquire the land at an acceptable price? Since the City cannot expropriate unless it complies with Section 130 of the Municipal Government Act I am drawn to the conclusion that the City has not passed a valid bylaw. This bylaw is null and void on the grounds that I have given and for that reason there shall be an order that; (does the City have an Expropriation Procedure Bylaw List or do they just list the bylaws numerically, because in the proceedings here it is called "Expropriation Bylaw 8196?)"

MR. BOWES: Just Bylaw 8196.

THE COURT: So there will be an order quashing the City of Calgary Bylaw 8196. This has been filed in the Land Titles Office. There will be an appropriate order which will result in the Registrar of Land Titles rectifying the register so that the effect will be that the lands affected by the bylaw shall revert to the applicant.

Is there anything further gentlemen?

MR. BOWES: Costs, sir.

THE COURT: There will be costs to the applicant

MR. BOWES: We have \$100.00 security for costs in the Clerk's office which I assume we have back.

THE COURT: There will be an order directing that the security for costs be returned to the applicant.

MR. PORTIGAL: Perhaps you should direct on what scale of costs.

THE COURT: Do you want to discuss the scale of costs. What is this land worth? An application such as this is under the tariff of fees or do you want me to suggest an amount?

MR. BOWES: Frankly, sir, if you set an

amount I think we would find it agreeable. I would suggest that it would have to be in terms of column 5 at least.

THE COURT: We will put it on application for a final judgment, column 5, that will give you something to work on.

MR. PORTIGAL: It is probably a special application under section, I am not sure - column - if I had a set of rules here.

MR. BOWES: I suspect that this will be ll (d), sir or ll (c) special application.

MR. PORTIGAL: Motion for judgment or ll (a) special application.

THE COURT: Does it make any difference?

MR. PORTIGAL: Both \$140.00.

THE COURT: Very well under ll (c), a special application. Well costs in column 5, ll (c).

MR. BOWES: Would you permit the witnesses and so on sir for examination of witnesses ---

THE COURT: You can't go any further, the witnesses are entitled to witness fees.

CALGARY, Alberta
November 17th, 1971

L. E. Bowes, Esq.,
Appeared for the Applicant..

L. S. Portigal, Esq.,
Appeared for the Respondent.

